Supreme Court, U.S.
FILED

02 77 JUL 9 2002

OFFICE OF THE CLERK

(1)

No.

In The Supreme Court of the United States

DANIEL BARRON, Petitioner

v.

STATE OF CALIFORNIA, Respondent

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

Lyn A. Woodward
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34pgs

QUESTIONS PRESENTED

1. May law enforcement officers detain a passenger in a vehicle to determine whether he is on probation without any individualized suspicion of criminal wrongdoing?

2. Do search terms imposed under California law purporting to permit a probation search without any individualized suspicion of wrongdoing violate the Fourth Amendment?

3. Does a probationer's acceptance of probation terms instead of a state prison sentence constitute a complete waiver of Fourth Amendment rights?

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PETITION

Petitioner Daniel Barron respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Six, affirming his conviction and the denial of his motion to suppress evidence pursuant to the Fourth Amendment to the United States Constitution.

LIST OF PARTIES

The parties are as they appear in the caption.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Six, is not published. A copy is attached as Appendix B. The California Supreme Court's order denying review on April 10, 2002 is attached as Appendix A. The order imposing sentence of the Superior Court of the State of California, County of Ventura, is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a). The California Court of Appeal, Second District, Division Six, filed its opinion on January 17, 2002. The California Supreme Court filed its order denying review on April 10, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to
>
> be search, and the persons or things

to be seized.

STATE STATUTES INVOLVED

California Penal Code section 1538.5, subdivision (a)(1)(A):

> (a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> (A) The search or seizure without a warrant was unreasonable....

STATEMENT OF THE CASE

Petitioner, Daniel Barron, was a passenger in a car stopped for a traffic violation on September 15, 2000 by Deputy Javier Chavez of the Moorpark Police Department. *Reporter's Tran-*

script "RT" 15. While contacting the driver, Chavez noticed and recognized Barron from prior contacts, and believed he had active probation search terms for weapons and drugs. RT 16-17. Chavez ordered both Barron and the driver out of the car, and requested dispatch to run both the driver's name and Barron's name for warrants and probation. RT 17-18. Dispatch confirmed Barron's probation search term. RT 18. Chavez performed a pat-down search for weapons of Barron, which yielded nothing. Chavez then ordered Barron to removed his shoes and socks, whereupon a small quantity of cocaine fell out of Barron's left shoe. RT 18-21.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

Barron moved the trial court to suppress evidence pursuant to the Fourth Amendment of the Federal Constitution, according to the procedure provided for by state law in California Penal Code section 1538.5. *Clerk's Transcript,*

1-28, 40.

In ruling on Barron's motion to suppress, the trial court received testimony from the Moorpark Police Department Officer who performed the searched. CT 17-21. When the trial court denied his motion, Barron pled guilty to possession of a controlled substance.

REASONS FOR GRANTING THE WRIT

The California Court of Appeal, Second District, Division Six has decided an important question of federal law that should be resolved by this Court. Specifically, the California Court of Appeal has concluded that a law enforcement officer may detain a passenger to determine whether he is on probation, and may further search that passenger without any individualized suspicion of criminal wrongdoing. Specifically, the issue in this case is one that this Court left unresolved in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 592-593 fn. 6 (2001), to wit: whether the detention and search of a probationer, absent any showing of a particularized suspicion, violates the

reasonableness requirement of the Fourth Amendment.

The California Supreme Court was provided the opportunity to review petitioner's Fourth Amendment challenge to his conviction, and declined to do so.

Because the California courts continue to disregarded basic Fourth Amendment protections of probationers, Barron respectfully requests that this Court consider the issue in his case.

I. THE FOURTH AMENDMENT DOES NOT PERMIT A SUSPICIONLESS SEARCH OF A PASSENGER WHO IS ON PROBATION.

In *People v. Reyes*, 4 Cal.4th at 743 (1998), the California Supreme Court in a 4-3 opinion overruled its earlier decision in *People v. Burgener*, 41 Cal.3d 505 (1986), and expanded and followed its decision in *In re Tyrell J.*, 8 Cal.4th 68 (1994). Noting that the United States Supreme Court has not yet decided the issue, the *Reyes* majority held that a warrantless search of a parolee's home need

not be justified by probable cause. *Id.* at 751-752. In reaching this conclusion, the Court explained that the *In re Tyrell J.* approach "seems preferable to the more rigid formulations of earlier cases." *People v. Reyes, supra,* 4 Cal.4th at 750.

In *Reyes,* then, the California Supreme Court held that a particularized suspicion is not required before a parole agent searches his parolee's residence for drugs. *People v. Reyes, supra,* 4 Cal.4th at 753. Instead, the Fourth Amendment protects parolees only from searches that are "arbitrary and capricious," that is a search motivated by illegitimate purpose, such as personal animosity. *In re Anthony S.*, 4 Cal.App.4th 1000, 1004 (1992) cited with approval in *People v. Reyes, supra,* 4 Cal.4th at 754. *Id.* at 753-754.

Here, the Court of Appeal adopted the California Supreme Court's arbitrary and capricious test, and pursuant to that test denied Barron's motion to suppress:

There is no evidence that appellant

> was stopped for arbitrary or capricious reasons or for purpose of harassment. Appendix A, page 4.

The Court of Appeal, relying on *People v. Reyes, supra,* 19 Cal.4th 751, specifically declined to impose a "particularized suspicion" requirement of any kind:

> Our Supreme Court has held that searches of parolees or probationers without any reasonable suspicion are lawful. [Citations.] The court has reasoned that an adult probationer, like appellant, consents to a waiver of his Fourth Amendment rights in exchange for the opportunity to avoid serving a state prison sentence. [Citation.] Appendix A, page 2-3.

More recently, in *United States v. Knights, supra,* this Court held that reasonable suspicion, rather than probable cause, was sufficient to support the search of a probationer's home for "investigatory" rather than "probationary" purposes. *United States v. Knights, supra,* 123 S. Ct. at 592, fn. 6. This Court declined to decide the broader issue of whether an investigatory search per-

formed absent any individualized suspicion would satisfy the reasonableness requirement of the Fourth Amendment. *Ibid.*

Fourth Amendment rights are triggered when there exists a reasonable expectation of privacy. As explained by the dissenting Justice Kennard in *Reyes, supra,* this Court "has never held that the Fourth Amendment to the federal Constitution permits warrantless, non-consensual government searches of private residences without at least reasonable suspicion." *People v. Reyes, supra,* 19 Cal.4th at 759. "Reasonable suspicion" means "specific and articulable facts" rather than "a mere inchoate and unparticularized suspicion or hunch." *Maryland v. Buie,* 494 U.S. 325 (1990).

Deputy Chavez here did not claim reasonable suspicion of criminal activity. Instead, he admittedly searched Barron without a particularized suspicion pursuant to probation search terms. Such a search does not satify the search and seizure protections of the Fourth Amendment as consistently interpreted by this Court.

II. PROBATIONERS DO NOT WHOLLY WAIVE THEIR FOURTH AMENDMENT RIGHTS.

This Court has explained that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure...the Fourth Amendment imposes no irreducible requirement of such suspicion." *New Jersey v. T.L.O.*, 469 U.S. 325, 342, fn. 8 (1985). The measure of whether a search condition is constitutional is whether that condition is reasonable. It follow, then, that federal courts have continued to impose a Fourth Amendment reasonableness requirement in reviewing a search that has been conducted pursuant to a signed waiver, including a waiver in exchange for probation, or under a similar statutory scheme, regardless of whether the waiver permits a search "with or without reasonable suspicion." *See, e.g., United States v. Giannetta, supra,* 909 F.2d 571, 576, relying on *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

Relying on the absence of law generated by this Court on the subject, the California Supreme Court holds that search terms permitting

law enforcement to search for any reason or for no reason are equally constitutionally permissible. California's only limitation is that a search may not be harassing or arbitrary. *People v. Reyes, supra,* 19 Cal.4th 743. In reaching this conclusion, the California Supreme Court makes no distinction between parolees and probationers. *Ibid.*

Most state courts, relying on the balancing test set forth by this Court in *Griffin v. Wisconsin, supra,* 433 U.S. 868, adopt a reasonable suspicion standard or, alternatively, a rule barring parole and probation officers from acting as agents of law enforcement, or both. *See People v. Reyes, supra,* 19 Cal.4th 762, Justice Kennard, dissenting. California's decision not to adhere to such a standard, and to permit searches in the absence of any particularized suspicion, has resulted in law enforcement's use of parole and probation search terms during routine traffic stops to search and detain not only the driver but also any passengers who may by chance be riding in the de-

tained vehicle. Barron contents that such a rule unreasonable permits random detention and fosters harassment by law enforcement of persons believed to be subject to probation terms. Such a search provision violates the bare minimum requirements of the Fourth Amendment.

III. CONCLUSION.

For the reasons set forth herein, Barron respectfully requests that this Court accept review of his case, and that it reverse the decision of the California Court of Appeal.

DATED: July 8th, 2002

Respectfully submitted,

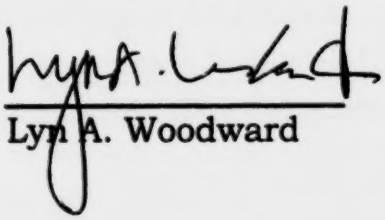
Lyn A. Woodward
Attorney at Law
309 Prescott Lane
Pacific Grove, California 93950
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

This original brief is presented in proportionately-spaced12 point Roman typeface (Bookman Oldstyle). The lines are spaced at least 2 points from one another. There are no footnotes. Quotes greater than 50 words in length are indented.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 8th day of July, 2002, at Pacific Grove, California.



Lyn A. Woodward

Court of Appeal, Second Appellate District,
Division Six-No. B148489
S104611

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE POEPLE, Plaintiff and Respondeont

v.

DANIEL BARRON, Defendant and Appellant

SUPREME COURT
FILED
APRIL - 10 2002
Frederick K. Ohlirich Clerk
Deputy

Petition for Review Denied.

George, C.J. was absent and did not participate.

NOT TO BE PUBLISHED

In the Court of Appeal of the State of California
Second Appellatre District
Division Six

THE POPLE
Plaintiff and Respondent,

v.

DANIEL BARRON,
Defendnat and Appellant.

2d Crim. No. B148489
(Super. Ct. No. 2000102189
(Ventura County)

COURT OF APPEAL-SECOND DIST.
FILED
JAN 17 2002
JOSEPH A. LANE, Clerk
Deputy Clerk

Daniel Barron pleaded guilty to possession of a controlled substance, (Health & Saf. Cide, Statute 11350, subd. (a).) The trial court suspended imposition of sentence and placed him on formal probation for 36 months on the condition, among others, that he serve 120 days in jail. Appellant contends the trial court erred in denying his motion to suppress evidence obtained during a warrantless search. We affirm.

Factual and Procedural Background

In September of 2000, Deputy Javier Chavez of the Moorpark Police Department initiated a traffic stop of a vehicle for failure to obey a stop sign,

Deputy Chaves saw appellant seated in the right fromt passenger seat of the vehicle, recognized him from prior contacts, and believed he was on probation with search terms for narcotics and weapons. Deputy Chavez asked appellant if he was still on probation and appellant replied that he was. The deputy confirmed with dispatch that appellant had active search terms for both weapons and drugs.

Although he did not suspect appellant of any criminal activity, Deputy Chavez advised appellant he was going to conduct a search pursuant to the terms of his probation. The deputy asked appellant to remove his shoes and a small quantity of cocaine fell out of his left shoe. Appellant was arrested and charges with possession of cocaine.

Appellant moved to suppress the evidence on the ground that the search leading to the cocaine violated his Fourth Amendment rights because it was not supported by reasonable suspicion that he had violated his probation by resuming criminal activity. The trial court denied the motion, reasoning that the search was carried out in a reasonable manner, the deputy was simply enforcing the terms of appellant's probation when the opportunity to do so presented itself, and there

was no harassment.

Discussion

Appellant contends the trial court erred in denying his motion to suppress. He argues the warrantless search was unlawful because it was not supported by reasonable suspicion that he was violating the terms of his probation. Alternatively, he argues the search was conducted in an arbitrary or unlawful manner because the officer detained him solely to check his probation status and search him if the search terms were still in effect. He argues the Fourth Amendment does not permit a detention of passengers to check for warrant and probation search terms. His contentions are without merit.

Our Supreme Court has held that searches of parolees or probationers without any reasonable suspicion are lawful. (*People v. Woods* (199) 21 Cal.4th 668, 675; *People v. Reyes* (1998) 19 Cal.4th 743, 751; *People v. Bravo* (1987) 43 Cal.3d 600, 607.) The court has reasoned that an adult probationer, like appellant, consents to a waiver of his Fouth Amendment rights in exchange for the opportunity to avoid serving a state prison sentence. (*Bravo*, at p. 608.) "`[W]hen [a] defendant in order to obtain probation specifically agree[s] to permit at any time a warrantless search

of his person, car and house, he voluntarily waive[s] whatever claim of privacy he might otherwise have had.'" (*Id.* At p. 607.) The consent is a complete waiver of Fourth Amendment rights, with the exception of the right to object to searches conducted for harassment or in an unreasonable manner. (*Ibid.*; see also *In re Tyrell J.* (1994) 8 Cal.4th 68,80 [juvenile probationer subject to a valid search condition has no reasonable expectation of privacy over his person or property]; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1006 [same].)

Our Supreme Court has expressly declined to hold that a probationer's consent to a waiver of Fourth Amendment rights must be limited to searches conducted upon reasonable suspicion. (*People v. Reyes, supra,* 19 Cal.4th at pp. 750-752; *People v. Woods, supra,* 21 Cal.4th at p. 675; *People v. Bravo, supra,* 43 Cal.3dat p. 607.) As the court in *Reyes* explained, "When involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious, or harassing." (*Reyes,* at p. 752.)The observed goal is to discourage recidivism by let-

ting probationers know they can be searched at any time without cause and to ascertain compliance with the terms of probation. (*Ibid.*)

Here, appellant was subject to a consent to search term as a condition of his probation when Deputy Chavez stopped the vehicle. Appellant, therefore, had no reasonable expectation of privacy at the time he was searched, and the officer was not required to have any particularized suspicion of criminal activity in order to search him. There is no evidence in the record that appellant was stopped for arbitrary or capricious reasons or for purposes of harassment. (See *People v. Reyes, supra,* 19 Cal.4th at pp. 753-745 [parole search could become constitutionally unreasonable if made too often, at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressove conduct by the searching officer].) The deputy stopped the car in which appellant was riding because he witnessed a Vehicle Code violation.

We reject appellant's contention that his Fourth Amendment rights were violated because he was detained for no reason while the officer checked his probation status. Upon stopping the vehicle, the deputy recognized appellant and remembered he was on probation for narcotics and

weapons violations. He verified this fact with appellant. Although he could have searched appellant immediately at this point, he confirmed his probation status with dispatch before actually commencing the search. It would thward the purposes of the exlusionary rule to suppress tha evidence and penalize the deputy for the brief delay that occurred while he took this extra step. The purpose of the exclusionary rule is to deter police misconduct. (*In re Tyrell J.*, supra, 8 Cal4th at p. 89.) Here, the deputy ensured that appellant's search terms were still in effect before commencing to search him. The search that followed was not unreasonably prolonged, and the conduct of the deputy was neither arbitrary, capricious, nor harassing.

We also reject appellant's contention that the federal Constitution requires, at a minimum, that officers have a reasonable suspicion of criminal activity before they may lawfully search a probationer. *United States v. Knights* (Dec. 10, 2001, No. 00-1260) __ U.S. ___[2001 D.A.R. 12759] is not helpful to appellant. There, the Supreme Court held that a warrantless probation search supported by reasonable suspicion satisfied the Fourth Amendment. The court expressly declined to address the constitutionality of a "suspicionless

search" because the search before it was supported by reasonable suspicion. (*Id.* at p. __, fn. 6.) Similarly, in *Griffin v. Wisconsin* (1987) 483 U.S. 868, 873-874, the Supreme Court uphels a warrantless probation search conducted pursuant to a valid state regulation authorizing such searches when supervisory approval was first obtained and reasonable ground existed to believe that contraband would be found. *Griffin* did not address the question whether reasonable suspicion is required by the Fourth Amendment before a warrantless search may be made pursuant to a probation condition.

Finally, the federal circuit court decisions appellant cites are contrary to our Supreme Court decisions in *Reyes, Woods, and Bravo*, and are not controlling. (E.g., *United States v. Giannetta* (1st Cir. 1990) 909 F.2d 571, 576 [probation search properly conducted with reasonable suspicion]; *Toomey v. Bunnell* (9th Cir. 1990) 898 F. 2d 741, 744 [parole search may be conducted with reasonable suspicion].) We must follow the decisions of our Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF VENTURA

MINUTE ORDER REPORT

Case Number 2000102189 People v. Barron, Daniel

Violations

Cnt	S/A Off Lvl	Plea	Dt Plea	Disposition	Dt Dispo	Bail Amt
1	F 11350(a) HS Possession Of A Controlled Substance	Not Guilty	09/19/00			$10,000.00

Fiscal

Component	Due	Balance
Fines/PA	$.00	$.00
Case Total:	$.00	$.00

Docket Dt	Seq	Code	Text
10/03/2000	1	HHELD	PRELIMINARY EXAMINATION Heard in Court-room 11 on Oct 03,2000 at 09:00 AM

2	OFJUD	Judge Gutierrez, Arturo F.
3	OFJA	Judicial Assistant—Lagana, Martha M.
4	OFREP	Court Reporter, Cress, Rhonda is present.
5	PP	The defendant is present.
6	PPDA	Deputy District Attorney C. Jenson is present.
7	PPD	Public Defender M. Wolter is present in court.
8	TRAS	This case is assigned to Courtroom 47.
9	FL170	170.6 Motion filed against Judge McGrath
10	TRAS	The case is assigned to Courtroom 47.
11	CLASG	Case assigned to Courtroom 45 for PRELIMIARY EXAMINATION to begin 10/03/00 at 09:00 AM.
12	BLBBC	Court orders bail bond continued.
13	BLOTA	The Court orders you to appear.
14	HHELD	PRELIMINARY EXAMI

		NATION Heard in Court-room 45 on Oct 03,2000 at 09:00 AM
15	OFJUD	Judge Cloninger, James P.
16	OFJA	Judicial Assisant—Martin, Robert A.
17	PP	The defendant is present.
18	PTDEF	Attorney of record Wolter, Martha, for defendant.
19	PPDA	Deputy District Attorney Chrystina Jensen is present.
20	FCFREE	Following arguent, court delines to make a ruling regarding late filings in behalf of the defense
21	PTPE	The Preliminary Hearing Comences
22	MOCM1	The court is in session, all the parties are present, the 1538.5 PC moion commences
23	TRWIT	People's witness Javier Chavez is sworn and testiies.
24	EXMRK	People's exhibit

		#1 is marked for identification.
25	TRWID	The witness identifies the defendant.
26	TRCROSS	Cross-Examination of the Witness Commences.
27	TRWE	The witness is excused.
28	PTSTIP	For purposes of the Preliminary Hearing only, the parties stipulate to the following: That the substance removed from the defendant's shoe was tested by the Ventura County Sheriff's Crime Lab and was found to be a controlled substance.
29	EXRCD	People's Exhibit

		#1 is receivedinto evidence
30	TRREST	People rest.
31	TRUN	The matter before the court is uncontested.
32	FCFREE	Argument by counsel.
33	FCFREE	Motion pursuant to 1538.5 PC is denied.
34	PTHTA	The defendant is held to answer to Superior Court on 10/17/00 at 01:30 PM in Courtroom 11 for arraignment on an information.
35	PTHTAF	The court orders The Complaint and Order holding the Defendant to Answer, after Preliminary Hearing, be filed.
36	PTSTIP	For purposes of the Preliminary Hearing only, the parties stipulate to the following: That People's Exhibit 1 may be returned to the people.

37	BLOTA	The court orders you to appear.
38	BLBBC	Court orders bail bond continued.

No. 02-77

SUPREME COURT, U.S.
FILED
NOV 4 2002
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BARRON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May law enforcement officers detain a passenger in a vehicle to determine whether he is on probation without any individualized suspicion of criminal wrongdoing?

2. Do search terms imposed under California law purporting to permit a probation search without any individualized suspicion of wrongdoing violate the Fourth Amendment?

3. Does a probationer's acceptance of probation terms, allowing a search of that person, instead of a state prison sentence, constitute a complete waiver of Fourth Amendment rights?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-77

DANIEL BARRON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

STATEMENT OF THE CASE

Following the denial of his motion to suppress evidence pursuant to California Penal Code section 1538.5, petitioner pled guilty to possession of a controlled substance. Cal. Health & Safety Code § 11350(a). The trial court suspended imposition of sentence and placed petitioner on formal probation for thirty-six months, on the condition, among others, that he serve 120 days in county jail. (CT at 37, 53, 55-66, 70-73; RT at 8-9, 14.)

The California Court of Appeal, Second Appellate District, affirmed the judgment of the trial court. The Court of Appeal found that the trial court properly denied petitioner's motion to suppress evidence. (Petition, Appendix B (Opinion at 2-5).)

Petitioner filed a petition for review in the California Supreme Court, arguing that the trial court erred by denying his motion to suppress evidence, on grounds that the search violated the Fourth Amendment of the United States Constitution. The California Supreme Court denied the petition for review.

(Petition, Appendix A.)

Petitioner filed the instant Petition for Writ of Certiorari (hereinafter "Petition") in this Court on July 9, 2002.

STATEMENT OF FACTS

At approximately 5:50 p.m., on September 15, 2000, Deputy Javier Chavez noticed a car fail to stop at a stop sign in Moorpark. Deputy Chavez stopped the car, which contained two occupants. Petitioner was in the passenger seat, and another person was the driver. Deputy Chavez recognized petitioner from a previous encounter and knew from conducting a field interview with petitioner that he was on probation for narcotics and weapons violations, with terms allowing for search of his property and person. (Supp. CT at 14-17.)

Deputy Chavez asked petitioner if he was still on probation, and petitioner replied that he was. Petitioner and the driver got out of the car, as Deputy Chavez verified with dispatch that petitioner was still on probation with search terms.[1/] Deputy Chavez asked petitioner if he had any objections to being searched, and petitioner responded that he did not have any problem with it. (Supp. CT at 17-19.)

Petitioner was not wearing a shirt, so Deputy Chavez searched petitioner's shorts and then asked him to remove his shoes and socks. When petitioner removed his left shoe, a small item fell out of the shoe, onto the patrol car, and then to the ground. Deputy Chavez retrieved the item immediately and saw that it was a small plastic bindle, brownish in color, containing two small rocks. Deputy Chavez suspected the item was a controlled substance, and petitioner eventually told him it was cocaine. Petitioner was arrested, and lab tests indicated the substance was a usable quantity of cocaine. (Supp. CT at 18-20, 22.)

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1. Petitioner had a consent to search term pursuant to his probation. (CT at 17.)

ARGUMENT

I.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S DETENTION-OF-PASSENGER CLAIM BECAUSE PETITIONER FAILS TO ADDRESS THE ISSUE IN THE PETITION

Petitioner contends in his first question presented that this Court should grant certiorari in order to determine whether law enforcement officers may detain a passenger in a vehicle to determine whether he is on probation without any individualized suspicion of criminal wrongdoing. (Petition at i.) But petitioner fails to address this issue anywhere in the Petition, except in the section entitled, "Questions Presented." (Petition at i.) The Petition contains no showing of why this issue is important or in conflict among various jurisdictions and therefore does not explain how it meets this Court's Rule 10 criteria.

In any event, the officer had reason to believe that petitioner was on probation and subject to search terms, thereby justifying petitioner's brief detention. The record does not indicate any detention, beyond that necessary for the traffic stop, that preceded petitioner's acknowledgment that he was on probation and subject to a search condition. This Court should therefore deny certiorari on petitioner's first question presented.

II.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S PROBATION-SEARCH CLAIM BECAUSE THE CALIFORNIA SUPREME COURT IS CURRENTLY REVIEWING A CASE THAT RAISES THE SAME ISSUE

Petitioner contends in his second question presented that this Court should grant certiorari in order to determine whether probation search terms imposed under California law that permit a probation search without any individualized suspicion of wrongdoing violate the Fourth Amendment. (Petition at 6-9.) This Court should deny certiorari on this issue because the California Supreme Court has granted review in a case where the same issue is being considered.

Prior to 1994, California courts required law enforcement officers to have "reasonable suspicion" that a parolee was violating the conditions of his parole before they could search a parolee's residence pursuant to a parole search condition. *People v. Burgener*, 41 Cal. 3d 505, 536, 224 Cal. Rptr. 112 (1986). However, in *In re Tyrell J.*, 8 Cal. 4th 68, 86, 32 Cal. Rptr. 2d 33 (1994), the California Supreme Court abandoned the "reasonable suspicion" requirement, and held that a juvenile probationer subject to a valid probation search condition "does not have a *reasonable* expectation of privacy over his or her person or property." Therefore, the court found that the Fourth Amendment of the United States Constitution did not require that law enforcement have any type of individualized suspicion that a juvenile probationer was engaged in illegal activity prior to conducting a warrantless search of the probationer's person. *Id.* at 88-89. Further, because the juvenile probationer had no reasonable expectation of privacy, the police were not required to be aware of the existence of the probationer's search condition prior to the search. *Id.* at 87.

The California Supreme Court extended this ruling to

adult parolees in *People v. Reyes*, 19 Cal. 4th 743, 754, 80 Cal. Rptr. 2d 734 (1998), where it held that "even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society is "prepared to recognize as legitimate."'" However, law enforcement officials may not conduct a search that is "arbitrary, capricious or harassing." *Id.* at 752. Pursuant to this logic, the California Supreme Court upheld a warrantless search of a parolee's residence. *Id.* at 756.[2]

But, in *People v. Robles*, 23 Cal. 4th 789, 97 Cal. Rptr. 2d 914 (2000), the California Supreme Court found that a search of a parolee's residence that resulted in the discovery of incriminating evidence against the parolee and his roommate was not justified where the police were not aware of the search condition prior to the search. *Id.* at 799-800. The three concurring justices in *Robles* stated that the court's holding was in tension with its recent case law concerning searches pursuant to probation and parole search conditions. *Id.* at 802-07 (Mosk, J., Kennard, J., Brown, J., concurring). Justice Brown, noting that "*Tyrell J.* has . . . not escaped criticism," argued that "we should avoid endorsing, and thus perpetuating, its dubious reasoning." *Robles*, 23 Cal. 4th at 806 (Brown, J., concurring).

On February 28, 2001, the California Supreme Court granted review in *People v. Sanders*, 23 P.3d 42, 107 Cal. Rptr. 2d 148 (2001). In *Sanders*, the California Court of Appeal found that a warrantless and suspicionless search of a parolee's residence violated the Fourth Amendment. The court stated, "[t]o be sure, our California Supreme Court has provided mixed signals in the way it has resolved *Tyrell J.*, *Reyes*, *Woods*[3] and

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2. The California Supreme Court declined to determine if the police had reasonable suspicion to search the parolee's residence because the prosecution did not press that issue to the court. *Reyes*, 19 Cal. 4th at 747 n.1.

3. *People v. Woods*, 21 Cal. 4th 668, 88 Cal. Rptr. 2d 88

Robles." *People v. Sanders*, formerly published at 84 Cal. App. 4th 1211, 101 Cal. Rptr. 2d 456, 469 (2000). The California Court of Appeal further stated that the "six-year-old 'logic of *Tyrell J.*' has been subject to much criticism," and noted that "we await further guidance from the California Supreme Court on this important issue." *Id.* In the Briefs filed in the California Supreme Court in *Sanders*, the two appellants have argued that *Tyrell J.* and *Reyes* were wrongly decided, and that the California Supreme Court should require law enforcement to have "reasonable suspicion" prior to conducting a warrantless search of a parolee. (Appendix A (Appellant Arlene Dena Sanders' Answer Brief On The Merits at 9-17), and B (Appellant Kenton Michael McDaniel's Answer Brief On The Merits at 7-24).)

Although the California Supreme Court has indicated that probationers with consensual search conditions differ to some extent from parolees (*see Reyes*, 19 Cal.4th at 749-52), there is nevertheless a similarity between the two classes[4/] to

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(1999) [upholding a warrantless search of a probationer's residence that resulted in the discovery of incriminating evidence against the probationer's roommate].

4. In general, both the federal courts of appeal and state courts appear to be in agreement that probationers and parolees have the same "constitutional status" under the Fourth Amendment. *United States v. Grimes*, 225 F.3d 254, 258 (2d Cir. 2000); *United States v. Lewis*, 71 F.3d 358, 361 (10th Cir. 1995); *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988); *Owens v. Kelley*, 681 F.2d 1362, 1367 n.8 (11th Cir. 1982) [there is no difference between the "constitutional status" of probationers and parolees]; *State v. McCullough*, 6 P.3d 774, 779 (Colo. 2000); *State v. Benton*, 695 N.E.2d. 757, 760 n.1 (Ohio 1998) ["[T]here is no material difference between probationers and parolees in the context of constitutional guarantees."]; *Commonwealth v. Williams*, 692 A.2d 1031, 1035

justify the expectation that the California Supreme Court's ruling in the pending *Sanders* case might have a profound impact on probationers as well.

Even when "novel and important constitutional questions" are raised in a petition for writ of certiorari, denial of certiorari is appropriate if the question is being decided by the lower courts. *Carpenter v. Gomez*, 516 U.S. 981, 981 (1995) (Stevens, J., concurring in denial of certiorari). "[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., concurring in denial of certiorari); *see also Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Riggs v. California*, 525 U.S. 1114, 1116 (1999) (Stevens, J., joined by Souter, J., and Ginsburg, J., concurring in denial of certiorari). "[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals" to review the question first. *Brown v. Texas*, 522 U.S. 940, 943 (1997) (Stevens, J., joined by Ginsburg, J., and Breyer, J., concurring in denial of certiorari).

Given that it appears the California Supreme Court is currently considering challenges to its previous case law in this area, it would be prudent for this Court to decline to grant certiorari in this case. *See Carpenter*, 516 U.S. at 982. Consequently, certiorari should be denied in regards to petitioner's second question presented.

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n.7 (Penn. 1997) [constitutional rights of probationers and parolees are "indistinguishable"]; *State v. Boston*, 889 P.2d 814, 816-17 (Mont. 1995); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 (1973).

III.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S PROBATION-AS-CONSENT CLAIM BECAUSE IT WAS NOT RAISED IN THE STATE COURTS

Petitioner's third question presented, whether a probationer's acceptance of probation terms, permitting searches instead of a state prison sentence, constitutes a complete waiver of Fourth Amendment rights, was not presented to the lower courts. Therefore, review of petitioner's third question presented would be imprudent since this claim was never factually or legally developed in the lower courts. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990).

Petitioner did not attempt to develop the facts concerning his acceptance of the probation search terms in the trial court. The record discloses only that petitioner consented to a search of his person and property as a condition of his probation. (CT at 17, 23.) The circumstances under which petitioner agreed to the probation search terms, and the legal significance of that consent in regards to a claim that petitioner waived his Fourth Amendment rights, were never litigated below. Rather, in the trial court, petitioner's legal position was simply that, regardless of his acceptance of the probation condition, the officer's search constituted an improper arbitrary intrusion in the absence of any resumption of criminal activity by petitioner. (Supp. CT at 23-24.)

In his Opening Brief in the California Court of Appeal, petitioner challenged the search of his person on the ground that law enforcement needed reasonable suspicion that a probationer has violated the terms of probation before a search is permissible. (Appendix C at 3-5.) Petitioner also claimed that the search was arbitrary and that his detention as the officer ran a probation check violated his Fourth Amendment rights. (Appendix C at 5-14.) He did not raise the issue of whether his acceptance of probation search terms was a waiver of his Fourth

Amendment rights.

It is the longstanding rule of this Court that it will not ordinarily decide issues not raised or resolved in the lower courts. *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 759-60 (1995); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Only in exceptional circumstances are questions not "pressed or passed upon below" reviewed by this Court. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Youakim*, 425 U.S. at 234. Petitioner has not argued, and Respondent cannot identify, any "exceptional circumstances" concerning this case that require this Court to ignore its longstanding rule that it will not review an issue that was not developed in the lower courts. Consequently, this Court should deny certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: November 4, 2002

Respectfully submitted,

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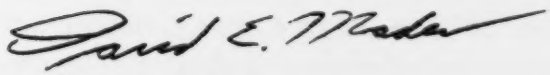

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APPENDIX A

DOCKETED
JUL 33 2002

BY P. FROST
No. F__2000DA0025

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARLENE DENA SANDERS, et al.** **Defendant and Appellant.**	**S094088**

Court of Appeal, Fifth Appellate District, No. F033862
Kern County Superior Court No. 77313

Honorable CLARENCE WESTRA, JR., STEPHEN P. GILDNER, and COLEEN W. RYAN, Judges

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APPELLANT ARLENE DENA SANDERS' ANSWER BRIEF ON THE MERITS

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By appointment of the Supreme
Court of the State of California

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARLENE DENA SANDERS, et al.** **Defendant and Appellant.**	Supreme Court No. S094088 Court of Appeal No. F033862 Superior Court No. 77313

APPEAL FROM THE SUPERIOR COURT
OF KERN COUNTY
Honorable CLARENCE WESTRA, JR., STEPHEN P. GILDNER, and COLEEN W. RYAN, Judges[1/]

APPELLANT ARLENE DENA SANDERS' ANSWER BRIEF ON THE MERITS

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1. Judge Gildner presided over the change of plea hearing. Judge Westra presided over pronouncement of judgment. Judge Ryan presided over the motion to suppress.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, Arlene Dena Sanders, respectfully requests that this court affirm the decision of the Court of Appeal below because it was correctly decided.

ISSUES PRESENTED

Issue 1.) Should this court reconsider its holding in *In re Tyrell J.* (1994) 8 Cal.4th 68, 74, that the otherwise illegal search of a minor who is subject to a probation search condition is "not unconstitutional despite the officer's ignorance of the search condition"?

Short Answer: **Yes.** The *Tyrell J.* decision is premised on the theory that a juvenile probationer has no reasonable expectation of privacy from searches that society is prepared to recognize. (*Id.* at pp. 74, 86, 89.) The decision is flawed because, contrary to that holding, a person subject to a search condition has some, albeit significantly diminished, expectation of privacy from searches. (*United States v. Knights* (2001) 534 U.S. 112, ___ 122 S.Ct. 587, 592-593.) Moreover, a search of a person subject to a search condition must be conducted for lawful probation, parole or other legitimate law enforcement purpose. (*United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. pp. 590-591; *People v. Robles* (2000) 23 Cal.4th 789, 797; *People v. Reyes* (1998) 19 Cal.4th 743, 754; *People v. Bravo*, (1987) 43 Cal.3d 600, 610.) Advance knowledge of a search condition by a searching officer is the only way this can be assured. (Cf. *People v. Robles, supra*, 23 Cal.4th at p. 797 [probation search of residence].) Otherwise, law enforcement officers will be encouraged to search first and ask questions later in the hope that the person or property searched may have

been subject to a search condition. (*In re Tyrell J., supra*, 8 Cal.4th at p. 98 (dis. opn. of Kennard, J.).)

Issue 2.) If the holding in *In re Tyrell J.* remains viable, should it apply to adult parolees who are subject to search conditions?

Short Answer: **No.** The court's decision should strictly limit the holding of *Tyrell J.* to the facts of that case. *Tyrell J.* involved the stop and frisk search of a juvenile at a sporting event. The instant case involves the search of a residence, a place where there is a greater expectation of privacy that society is prepared to recognize. (*People v. Robles, supra*, 23 Cal.4th at pp. 795, 799-800.) As noted, a search conducted of a person or property subject to a search condition must be reasonably related to the legal status of the person that subjects him or her to the search condition, or it must be conducted for some other legitimate law enforcement purpose. (*United States v. Knights, supra*, 534 U.S. 112, 122 S.Ct. pp. 590-591; *People v. Robles, supra*, 23 Cal.4th at p. 797; *People v. Reyes , supra*, 19 Cal.4th at p. 754; *People v. Bravo, supra*, 43 Cal.3d 600, 610.) Without advance knowledge of the search condition, the search is wholly arbitrary because it is without legal justification and without any perceived limits by law enforcement. (*People v. Robles, supra*, 23 Cal.4th at p. 797.) This court should thus reaffirm the rule of *In re Martinez* (1970) 1 Cal.3d 641, 646 that applies an advance knowledge requirement for a search under a parole condition and do so under a rationale similar to that set forth in *Robles*.

Issue 3.) Under the decision in *People v. Robles, supra*, does the admissibility of the fruits of the search in the present case differ as to defendant Sanders, who was not subject to a search condition, as compared to defendant McDaniel, who was?

Short Answer: **Yes.** Respondent notes, "where a search is later justified by after-acquired knowledge of the search

condition, a cotenant has the right to assert that his or her reasonable expectation of privacy has been violated, even though the probationer or parolee does not maintain the same right." (RBOM 23.)[2/] Respondent concedes cotenants enjoy measurably greater privacy expectations than a person subject to a search condition, and acknowledges that the reasoning of *Tyrell J.*, does not apply to a cotenant where the search is justified by after-acquired knowledge that another person in the residence was subject to a search condition. (RBOM 23.)

Appellant Sanders agrees, but suggests the fundamental analysis should be whether the cotenant knows or has reason to know that the person he or she is residing with is subject to a search condition. The rationale for justifying suspicionless searches of parolees is that "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored." (*People v. Reyes, supra*, 19 Cal.4th at p. 753.) Absent knowledge that a cohabitant is on parole and subject to a search condition, that rationale has no application to the other cohabitant. Unless the cohabitant is aware of the parolee's status, the cohabitant maintains a reasonable expectation of privacy in the premises that society is prepared to recognize.

STATEMENT OF THE CASE

An information dated May 13, 1999, filed by the Kern County District Attorney charged appellant, Arlene Dena Sanders, and her codefendant, Kenton Michael McDaniel, with a single count of possessing cocaine base for purposes of sale in violation of Health and Safety Code section 11351.5. (CT

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2. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporters Transcript on Appeal. "PR" refers to the probation report. "RBOM"refers to Respondent's New Brief On The Merits.

50-51.) A defense motion to suppress the evidence based on an unlawful search and seizure pursuant to Penal Code section 1538.5 was denied on June 24, 1999. (CT 62.) On June 25, 1999, the information was amended to add count two, possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). (CT 64.) On the same day, appellant Sanders entered a plea of guilty to count two in exchange for a sentence that included no more than a low term prison commitment of 16 months. (CT 65.)

On August 12, 1999, appellant Sanders was sentenced to prison for a term of 16 months, along with ancillary sentencing provisions and consequences. (CT 68-69, 72.)

On August 13, 1999, she filed a timely notice of appeal. (CT 71.) On November 20, 2000, in a published decision, the Court of Appeal, Third Appellate District, per Wiseman, J. reversed appellant's conviction. Respondent petitioned for review and this court granted review on February 28, 2001. Briefing on the issues described above was ordered on March 27, 2002.

STATEMENT OF FACTS[3/]

On April 6, 1999, appellant Sanders and appellant Kenton McDaniel shared apartment 18 at 1905 California in Bakersfield. (RT 46.) McDaniel was on active parole. His terms of parole included submission to random searches at his home. (RT 6-10.)

On that date, as the manager of the apartment complex returned to the apartments, a tenant informed her there was a fight going on between Sanders and McDaniel in apartment 18. Although the manager had seen no fight or heard no loud voices, she called 911. When police officers Davis and Thatcher arrived, the manager told them Sanders and McDaniel were

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3. Facts are taken from evidence presented at the motion to suppress. The quantity of contraband seized is taken from the probation report.

fighting and pointed out the apartment. (RT 11-12, 36, 38, 44-50.)

Davis and Thatcher went to the apartment and heard male and female voices yelling at one another. (RT 12.) Thatcher knocked on the door but no one immediately answered. (RT 12.) Sanders peaked out of the blinds and the arguing stopped. (RT 13, 27, 39, 41.) A dead bolt was heard being worked. About 15 to 30 seconds later, Thatcher again knocked on the door, identifying the officers as police and demanding that the door be immediately opened. (RT 13-14, 27-28.) Some 15 to 30 seconds later the locking mechanism was again heard and the door opened. (RT 14, 27- 28.) Sanders was standing on the other side of the door. (RT 14.) McDaniel was standing behind her. (RT 15, 40.)

Thatcher remarked Sanders' face was cut. The police entered the apartment, believing there was a domestic violence situation and that the suspect, McDaniel, was standing behind the victim. (RT 15, 41-42.) The mark on Sanders' face was a small abrasion no more than an inch in length and diameter. (RT 21.) The police had seen no aggressive moves by McDaniel against Sanders. (RT 31.) Almost immediately as the police entered the apartment, Sanders said "What the fuck you all doing in my house? Get the fuck out of my house." (RT 29, 41.) McDaniel also told the police he did not want them in the house without a warrant. (RT 29, 32.)

When the police entered, McDaniel was seen stuffing a metallic object beneath the cushions of a sofa.[4/] (RT 15-16, 31, 52.) Soon after the police entered, Sanders began "tussling" or struggling with Thatcher, and pulled out of her shirt in an effort to get away from him. (RT 32, 34-35, 36, 53-55.) McDaniel attempted to get involved, and walked toward Thatcher, telling him to leave Sanders alone. (RT 32.) McDaniel had been pressed against the wall by Davis and attempted to come off it when Thatcher and Sanders were struggling. McDaniel was

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4. A pair of stainless steel scissors with a black handle was later recovered from the couch. (RT 57.)

handcuffed and then put on the couch. (RT 29, 32, 55.) He was handcuffed because the police believed he was a suspect in a spousal abuse situation. (RT 29, 41-42.) Sanders was also handcuffed. (RT 38-39, 53.)

Davis then did a "protective sweep" of the other rooms in the apartment to ensure no one else was in the apartment that could pose a danger. (RT 16-17, 33, 35, 55-56.) In one of the bedroom closets, Davis noticed plastic bags in plain view containing white chunks of suspected cocaine base protruding from a brown work boot. (RT 17-18.) When Davis finished his sweep, he asked McDaniel his parole status, then determined from checking with other police that McDaniel was on active parole. (RT 18-20, 24-25.) A subsequent search with the aid of a canine yielded additional items of cocaine base. (RT 20.) A total of 4.72 grams of a substance containing cocaine base was found and seized. (PR 7.) Male and female clothing was found in the apartment, as was mail addressed to both Sanders and McDaniel. (RT 22-23.)

Sanders was given no medical treatment for the mark on her face before being booked. (RT 57, 65.) She testified that the blemish/cut on her face observed by the police had been there before April 6, 1999, and was from fights that had taken place long ago, not from any fight with McDaniel. (RT 61.) She denied telling police she received the scratch on her cheek because McDaniel followed her out of the apartment and she fell against the stucco wall. (RT 64.) The police did not mention parole until they had gone through all the rooms of the apartment. (RT 63.)

ARGUMENT

I.

THIS COURT SHOULD RECONSIDER AND OVERRULE ITS DECISION *IN RE TYRELL J.*, *SUPRA* , THAT THE OTHERWISE ILLEGAL SEARCH OF A MINOR WHO IS SUBJECT TO A PRORATION SEARCH CONDITION "IS NOT UNCONSTITUTIONAL DESPITE THE OFFICER'S IGNORANCE OF THE SEARCH CONDITION." *IN RE TYRELL J.* CANNOT BE RECONCILED WITH *PEOPLE V. ROBLES, SUPRA*. MOREOVER ONLY IF THE OFFICER IS AWARE OF A SEARCH CONDITION CAN IT BE ASSURED THAT THE SEARCH IS CONDUCTED FOR A PROPER PROBATION OR PAROLE PURPOSE.

"[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., Amend. IV; Cal.Const., art. I, § 13; Pen. Code § 1525.) In determining whether a search was reasonable under the Fourth Amendment, the inquiry focuses on whether the aggrieved party had an expectation of privacy that society is prepared to recognize as reasonable. (See *California v. Ciraolo* (1986) 476 U.S. 207, 211; *Katz v. United States* (1967) 389 U.S. 347, 361.)

Notwithstanding the language of the Fourth Amendment, the importance of the state's interest in public safety through probation and parole supervision justifies searches of those subject to search conditions without a warrant and without probable cause. (See *United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. 587, 592-593 [probation search]; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 873-876 [probation search]; *People v. Bravo, supra*, 43 Cal.3d 600, 607-609 [probation search]; *People v. Reyes, supra*, 19 Cal.4th at pp. 753-754 [parole search]; *People v. Burgener* (1986) 41 Cal.3d 505, 534,

overruled in part in *People v. Reyes, supra* [parole search].) *In re Tyrell J., supra*, holds that a juvenile probationer subject to a search condition has no reasonable expectation of privacy from searches that society is prepared to recognize. (*Id.* 4 Cal.4th at pp. 74, 86, 89.) The decision has been criticized from the time it was published. For example:

> The reasoning of *Tyrell J.* has also not escaped criticism among the commentators: "Whatever might be concluded about the necessity to permit the police to play some role in the enhanced scrutiny to be directed at those on probation and parole, quite obviously there is no rational basis upon which to uphold otherwise illegal police searches of persons only later determined to be on probation or parole.... Regrettably, that eminently sound position was later abandoned in *In re Tyrell J.* on the bizarre reasoning that a probationer who knows that his subject to 'a valid search condition' to his release consequently 'does not have a reasonable expectation of privacy over his person or property' vis-'a-vis any search by anyone, including a search by a police officer unaware of the probationer status! As the dissent in *Tyrell J.* aptly noted, that strange conclusion, without precedent in any jurisdiction, gives police an incentive to make searches even without probable cause because, should it turn out that the suspect is a probationer, the evidence will be admissible nonetheless." (4 LaFave, Search and Seizure, supra, § 10.10(e), pp. 791-792....)

(*People v. Robles, supra*, 23 Cal.4th at p. 806 (conc. opn. of Brown, J.).)

Appellant urges that this court should reconsider and overrule its opinion in *In re Tyrell J.* because the reasoning in that case is no longer viable. The underlying assumption of *Tyrell J.* is that because the juvenile probationer in that case had

no right to refuse probation and its search condition, and thus did not consent to its imposition, he therefore had no reasonable expectation of privacy from a detention and pat search of his person. (*Tyrell J.* at pp. 86, 88-89.) *Tyrell J.* is wrong in this premise since, as demonstrated below, every probationer and every parolee has some, albeit a reduced, expectation of privacy from searches and seizures under the Fourth Amendment. But even if the holding of *Tyrell J.* is still viable, its application must be narrowly limited to similar searches of the person in public locations and not extended to searches of the residence of a probationer or parolee where a greater expectation of privacy exists.

A. The premise of *Tyrell J.* is wrong because all probationers have some, albeit a reduced, expectation of privacy.

This court has traditionally justified probation searches on the theory that the probationer has consented to the search by agreeing to the search condition. (See *People v. Woods* (1999) 21 Cal.4th 668, 674-675.) *Tyrell J.*'s premise that there is no reasonable expectation of privacy from searches for a juvenile probationer because the juvenile has no right to refuse a probation search condition and thus does not consent to its imposition is wrong. There is a reasonable expectation of privacy from searches, even though significantly diminished, whether a probationer consents to the search condition or not. (*United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. 587, 591 fn.3, 592, 593; *Griffin v. Wisconsin, supra*, 483 U.S. at p. 872.) Although the United States Supreme Court declined in *Knights* to consider the issue of the constitutionality of a search condition that eliminated any expectation of privacy altogether, or a completely suspicionless search (*Knights* at 122 S.Ct. p. 592, fn.6), its upholding of the California search condition in that case was expressly based on its finding of a diminished expectation of privacy resulting from the search condition and the presence of reasonable suspicion for the

probation search. The high court held that the Fourth Amendment

> ...requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. [Citation]. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. [Citations.] Those interests warrant a lesser than probable cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable. ¶ The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary.

(*Id.* at 534 U.S. ____, 122 S.Ct. pp. 592-593.) Significantly, in *Knights* the searching detective was aware of the probation search condition. (*Id.* at 122 S.Ct p. 589.) *Knights* also holds that a probation search may be conducted for purposes of monitoring probation, as well as for some other law enforcement purpose. (*Id.* at122 S.Ct. pp. 590-591.) *Knights* declined to decide whether accepting the search condition amounted to consent to a waiver of Fourth Amendment rights, instead analyzing the case in terms of whether the search was reasonable within the Fourth Amendment under the totality of the circumstances. (*Id.* at 122 S.Ct. p. 591.)

In *Tyrell J.*, this court refused to impose an advance knowledge requirement of a search condition because the juvenile probationer had no reasonable expectation of privacy, and because doing so would be inconsistent with the juvenile probation scheme. (*Tyrell J. supra*, 8 Cal.4th at pp. 86-87.) If a probationer has reduced, rather than no, expectation of privacy through a search condition whether consented to or not as *Knights* implies, then a fundamental underpinning for the *Tyrell J.* decision no longer exists.

Moreover, if a reasonable suspicion is required to conduct a probation search as *Knights* also suggests, it follows that the officer conducting the search must know of the probation search condition. Otherwise, the officer would not be able to articulate the predicate fact of a probation search condition in order to justify a warrantless search.[5] Even if no reasonable suspicion is required to search a probationer, an officer still must, as a matter of sound Fourth Amendment logic, be aware of the existence of the search condition in order to justify the search on that basis.

> [U]nder the Fourth Amendment the police may not rely on a probation search condition of which they are unaware to justify a warrantless search. To permit them to do so, thereby encouraging them to "search first and ask questions later," is completely at odds with the Fourth Amendment's purpose of protecting persons and their possessions against unreasonable government intrusion. (*Tyrell J.*, at p. 98 (dis. opn. of Kennard, J.).)

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5. If a reasonable suspicion is required as *Knights* implies it might be, this court's holdings that a reasonable suspicion or reasonable cause is no longer required for either a probation search or a parole search as long as the search is not arbitrary, capricious or harassing, would no longer be viable. (*People v. Reyes, supra*, 19 Cal.4th at pp. 753-754 [parole]; *People v. Bravo supra*, 43 Cal.3d at pp. 610-611 [probation].)

(*People v. Robles, supra*, 23 Cal.4th at p. 803 (conc. opn. of Kennard, J.).) Conversely, requiring an officer to have knowledge of a search condition would have the desirable effect of encouraging law enforcement to refrain from conducting searches that would otherwise be objectively unreasonable.

This court in 1970 held that in order for a search to be legally justifiable as a parole search, the officer must be aware of the search condition. (*In re Martinez, supra*, 1 Cal.3d 641 at p. 646.)

> [R]egular police officers undertook the search pursuant to their general law enforcement duties; the officers, at the time of the search, did not even know of defendant's parole status. The investigation involved suspected criminal activity, not parole violations. Under these circumstances the officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of their search.

(*Ibid.*)

In declining to impose an advance knowledge requirement of a search condition on a searching officer, *Tyrell J.* distinguished *Martinez*, reasoning that since there is now an automatic imposition of the search condition for parolees, there is no longer any reasonable expectation of privacy from searches by police. (*Tyrell J.* at 8 Cal.4th pp. 88-89.) As noted, *United States v. Knights, supra*, suggests there is at least some, although diminished, expectation of privacy in a person who is subject to a search condition. (*See id.* 122 S.Ct. pp. 592-593.) If so, an officer must have advance knowledge of the search condition in order to ensure the search is conducted for a legitimate probation, parole or other proper law enforcement purpose. An even stronger argument exists that advance knowledge must be required if a reasonable suspicion is required in order to justify a search pursuant to a probation or

parole search condition. Otherwise, an officer would be permitted to conduct a search without a warrant fully aware that not the slightest justification existed to search on the offhand chance the search would later be upheld on the ground the defendant was subject to a search condition.

Respondent dismisses the dissent of Justice Kennard in *Tyrell J.*, arguing that it rests on "presumptions which are not necessarily correct" and "the fears expressed there have not come to pass." (RBOM 12.) On the contrary, the fears expressed in the dissent are precisely what happened in this case -- officers searched first and asked questions later. The same thing happened in the *Robles* case. Nor does respondent's contention that the exclusionary rule or civil remedies are sufficient to ameliorate any violation withstand even modest scrutiny. *Tyrell J.*, by holding there is no reasonable expectation of privacy from searches by a juvenile probationer that society is prepared to recognize, encourages Fourth Amendment violations by officers. Rather than providing a bright line rule that all persons must be presumed to have the same Fourth Amendment rights absent knowledge to the contrary, officers may now search knowing there is no reasonable, articulable basis on which the search may be upheld in the hope that the person searched may be subject to a search condition. The law should be designed to avoid Fourth Amendment violations, not merely to remedy violations once they have occurred.

Respondent further argues that the dissent in *Tyrell J.* ignores the limitation that probation searches may not be conducted in a harassing, arbitrary or capricious manner. The problem with this argument is that it still permits an otherwise unlawful search to be conducted, i.e., a search for an improper purpose, but the search may not rise to the level of being arbitrary, harassing or capricious. A probation search without a warrant can only be accomplished for a legitimate probation purpose or some other legitimate law enforcement purpose if the officer is first aware of the search condition.

Respondent cites a number of cases where officers had no advance knowledge of a search condition, including the instant

one and *Robles*, and points out that the officers in those cases had reasons, even though legally insufficient, for conducting the searches. Respondent contends because the officers had reasons, they were not conducting random, unconstitutional searches and then attempting to justify them with after acquired knowledge of a search condition. (RBOM 13.) Appellant perceives little, if any, difference between a legally insufficient reason and no reason. Moreover, it is naive to believe that any officer would willingly acknowledge he or she is randomly conducting unconstitutional searches in the hope the search may later be justified by a search condition. No officer would knowingly subject himself to civil liability for constitutional torts. (See *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388.) There will always be a proffered reason for a search, even though deficient. Again, the issue is whether a search is conducted for a legitimate probation or parole purpose, or some other legitimate law enforcement purpose. Absent prior knowledge of the search condition, it cannot be conducted for legitimate purposes.

Respondent also notes that *Tyrell J.* is no longer the only case in the country sanctioning a search on the basis of a search condition without advance knowledge of a search condition. *Anderson v. Commonwealth of Virginia* (VA 1998) 507 S.E2d 339 upheld a search based on consent to a search condition notwithstanding the officer's lack of knowledge. Anderson holds:

> Finally, we find meritless any contention that the officers' lack of prior knowledge of Anderson's waiver rendered the search invalid. The waiver expressly states that Anderson agreed to submit his person or property to "any law enforcement officer." (Emphasis added.) Indeed, Anderson concedes on brief that the waiver "did not have to be related to the supervision of [his] probation."

(*Id.* 507 S.E.2d at p. 342 [original emphasis].) Anderson fails to

offer any analysis for its conclusion other than the language of the waiver and the concession of the defendant. The issues of whether the search was justified on the basis of consent, or whether the defendant had a reasonable expectation of privacy, are not addressed at all. The slim reasoning in Anderson does little to support the *Tyrell J.* decision. Indeed, it is not even cited. Simply because *Tyrell J.* now has a brother in another jurisdiction, it is no less an orphan.

B. *In re Tyrell J.* cannot be reconciled with *People v. Robles, supra*, except on the basis that a probationer has a reduced expectation of privacy at his or her home, but no expectation of privacy for items on his or her person when away from home.

In *People v. Robles, supra*, this court recognized that the rule of *Tyrell J.* had limits:

> As our decisions indicate, searches that are undertaken pursuant to a probationer' s advance consent must be reasonably related to the purposes of probation. [Citation.] Significantly, a search of a particular residence cannot be "reasonably related" to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence. Moreover, if officers lack knowledge of a probationer' s advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority.

(*Robles* at 797.)[6]

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6. Even *Tyrell J.* indicates that advance knowledge of a probation search condition is desirable. It "helps ensure that

Robles and *Tyrell J.* are facially inconsistent and logically irreconcilable. The only effective way to differentiate them is to overrule the holding of *Tyrell J.* and require that advance knowledge of a search condition must always exist in order to justify a warrantless search on that basis. Alternatively, the holding of *Tyrell J.* should be strictly limited to its facts, i.e., to searches of a juvenile's person at a public event, and not applied to residences. This second option, while not as desirable as the first, would at least be consistent with the principle noted in *Robles* that a probationer has a greater expectation of privacy in his home. (*People v. Robles, supra*, 23 Cal.4th, at pp. 795, 799-800.)

II.

THIS COURT'S HOLDING IN *IN RE TYRELL J.*, *SUPRA*, THAT ADVANCE KNOWLEDGE OF A SEARCH CONDITION IS UNNECESSARY SHOULD NOT BE APPLIED TO ADULT PAROLEES SUBJECT TO A SEARCH CONDITION BECAUSE THE RATIONALE OF *PEOPLE V. ROBLES, SUPRA*, WHICH PROHIBITS PROBATION SEARCHES OF A RESIDENCE WITHOUT ADVANCE KNOWLEDGE OF THE SEARCH CONDITION, APPLIES WITH EQUAL FORCE TO PAROLE SEARCHES. MOREOVER, ANY DISTINCTION BETWEEN A RESIDENTIAL PROBATION SEARCH AND A RESIDENTIAL PAROLE SEARCH IS ONE WITHOUT A DIFFERENCE.

A strong reason for not imposing an advance knowledge

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the resulting search is not conducted 'for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes.'" (*Tyrell J.*, at p. 87, quoting *People v. Bravo, supra*, 43 Cal.3d at p. 610.)

requirement in *Tyrell J.* was the unique goals of the juvenile justice system in California:

> "Moreover, imposing a strict requirement that the searching officer must always have advance knowledge of the search condition would be inconsistent with the special needs of the juvenile probation scheme. That scheme embraces a goal of rehabilitating youngsters who have transgressed the law, a goal that is arguably stronger than in the adult context. (Cf. Welf. & Inst. Code, § 202, subd. (b) [acknowledging 'the "rehabilitative objectives" of the juvenile law] with Pen. Code, § 1170, subd. (a)(l) ["The Legislature finds and declares that the purpose of imprisonment for crime is punishment].) To better effectuate the rehabilitation of the juvenile, the condition of probation permitting police (and others) to conduct warrantless searches is imposed by the juvenile court to serve the important goal of deterring future misconduct. A juvenile probationer must thus assume every law enforcement officer might stop and search him at any moment. It is this thought that provides a strong deterrent effect upon the minor tempted to return to his antisocial ways.

(*Tyrell J.* at 8 Cal.4th pp. 86-87 [original brackets].) In spite of this language, the rationale of *Tyrell J.* was extended to adult parole searches in *People v. Reyes, supra*, insofar as it held that a reasonable suspicion was no longer required to search an adult parolee. (*Reyes, supra*, 19 Cal.4th at pp. 751-752.) The "logic" of *Tyrell J.* applied "equally, if not more so to parolees." (*Id.* at p. 751.) *Reyes* did not address whether knowledge of a parolee's status was required to conduct a search pursuant to parole search condition, presumably because the officers in *Reyes* had knowledge of the defendant's parole status. (*Id.* at pp. 746-747.)

Whatever justification may have existed for *Reyes* applying the *Tyrell J.* reasoning to adult parolees to overrule the

reasonable suspicion requirement for parole searches, its rationale does not extend to permitting residential adult parole searches absent advance knowledge by law enforcement of the parole search condition.

A private residence is afforded a greater expectation of privacy than, for example, a search of a juvenile's person at a football game as in *Tyrell J.* "'[Private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.' [Citations.]" (*People v. Robles, supra*, 23 Cal.4th at p. 795.) *Robles* held that advance knowledge was required of the probation search condition in that case. It stated, in part:

> ... the principal purpose of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'" [Citations.] In *Tyrell J.*, we concluded that dispensing with a strict 'knowledge-first' rule would not encourage law enforcement officials to engage in warrantless searches of juveniles because they would be '[taking] the chance' that if the target of a search is not subject to a search condition, any contraband found will be inadmissible in court. [Citation.] Although police officers therefore have sufficient incentive to avoid an improper search of a person (*ibid.*), residential searches present an altogether different situation.

(*People v. Robles, supra*, 23 Cal.4th, at pp. 799-800.) As in *Robles*, appellant Sanders was in her home where she had a reasonable expectation of privacy that society was prepared to recognize. Whether the search is sought to be justified pursuant to a probation search condition as in *Robles*, or the parole search condition of her roommate McDaniel, the result is still the same. Her Fourth Amendment rights were violated because there is no

meaningful distinction between a probation search as in *Robles* and a parole search as present here when applied to a residence. If advance knowledge of the search condition was required to search the residence if McDaniel had been on probation, it was likewise required if he was subject to a search condition as a result of parole.

In *Robles*, officers searched the defendant's residential garage without a warrant. Later, they discovered that the defendant's brother, a cohabitant of the residence, was on probation subject to a search condition and sought to justify the search on that basis. This court held that probation searches "must be reasonably related to the purposes of probation," a requirement that cannot be met "when the officers involved do not even know of a probationer who is sufficiently connected to the residence." (*Id.* 23 Cal.4th at p. 797.) "Moreover, if officers lack knowledge of a probationer' s advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*Ibid.*) *Robles* rejected an argument that *Tyrell J.* and *People v. Woods, supra* (upholding a search pursuant to a known probation search condition against a person sharing the probationer's residence), should validate the search:

> Contrary to the People's argument, *People v. Woods, supra*, 21 Cal.4th 668 [88 Cal.Rptr.2d 88, 981 P.2d 1019], does not support the proposition that police officers may lawfully enter a residential premises, without a warrant and without any awareness of a resident's probation search condition, to indiscriminately search for and seize evidence of suspected criminal wrongdoing. As our decisions indicate, searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation.

(*Robles, supra*, 23 Cal.4th at pp. 796-797.)

Prior to *Tyrell J.*, this court's 1970 decision in *People v. Martinez, supra*, made it evident the same rationale quoted above extended to parole searches. (*Martinez, supra*, 1 Cal.3d at p. 646.) This court should extend the rationale of *Robles* to parole searches and reaffirm the rule of *Martinez* because there is, in reality, no significant realistic difference between parole or probation search conditions. The only discernable difference at all between the two kinds of search conditions is their origin. The former are imposed automatically. (See *In re Tyrell J., supra*, 8 Cal.4th at pp. 88-89.) The latter are imposed under a theory of consent. (*People v. Woods, supra*, 21 Cal.4th at pp. 674-675.) This distinction, however, no longer has any significance. As noted above, *United States v. Knights, supra*, upheld a probation search condition as reasonable under the Fourth Amendment without deciding the issue of consent. (*Id.* 122 S.Ct. at pp. 591, 592, fn.6, 593.) Whether an adult probationer consented to a search condition is thus irrelevant.

Even if consent to a probation search condition is necessary, however, the distinction is still one without a meaningful difference. Both probation and parole search conditions have the same end result - a probationer or parolee has a reduced expectation of privacy and is subject to searches for valid parole, probationary or other legitimate law enforcement purposes. (*People v. Reyes, supra*, 19 Cal.4th 743, 754; *People v. Bravo, supra*, 43 Cal.3d at p. 610.) In logic, the theory under which a search condition is imposed has nothing to do with the ultimate question for resolution, i.e., whether the search condition has been invoked within the parameters of the Fourth Amendment. Applying this reasoning, if an officer must have advance knowledge under *Robles* of a probation search condition in order to search a residence without a warrant, advance knowledge of a parole search condition must likewise be required to search the residence of a parolee.

III.
A PERSON WHO COHABITS A RESIDENCE WITH A PERSON WHO IS SUBJECT TO A SEARCH CONDITION HAS A REASONABLE EXPECTATION OF PRIVACY IN THE PREMISES THAT SOCIETY IS PREPARED TO RECOGNIZE AS LEGITIMATE. ONLY WHERE THE COHABITANT CAN BE CHARGED WITH KNOWLEDGE OF THE OTHER RESIDENT'S SEARCH CONDITION IS THE EXPECTATION OF PRIVACY REDUCED.

Respondent concedes that

> "where a search is later justified by after-acquired knowledge of the search condition, a cotenant has the right to assert that his or her reasonable expectation of privacy has been violated, even though the probationer or parolee does not maintain the same right.

(RBOM 23.) Respondent further concedes, quoting *People v. Robles, supra*, 23 Cal.4th 798-799, that such cotenants "'enjoy measurably greater privacy expectations in the eyes of society'" than the person subject to the search condition. The reasoning of *Tyrell J.*, which focused on the reasonableness of the probationer's privacy expectations, does not apply to a cotenant where the search is justified by after-acquired knowledge that another person in the residence was subject to a search condition. (RBOM 23.)

Appellant Sanders agrees, but believes the operative analysis should be whether the cotenant knows or has reason to know that the person he or she is residing with is subject to a search condition. The rationale for upholding probation searches as applied to cotenants versus parole searches involving cotenants must also be examined.

"It long has been settled that a consent-based search is

valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. (*People v. Woods, supra*, 21 Cal.4th 668, 675.) "The 'common authority' theory of consent rests 'on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' [Citation]." (*Id.* at p. 676.) In *Woods*, a probation search condition was held to be advance consent to a search conducted pursuant to that condition and enforceable against others at the residence not subject to a search condition. (*Id.* at p. 681.)

As argued above, consent now appears irrelevant in probation search cases in light of *United States v. Knights, supra*. Even if the consent theory for imposition of a probation search condition still has some vitality, it has no application in a parole case. A parolee does not consent to imposition of a search condition. It is imposed automatically. (*In re Tyrell J., supra*, 8 Cal.4th at pp. 88-89.) A consent theory is thus not available to sustain a parole search. Moreover, even probation searches that may be justified on a theory of consent have limits:

> [I]f persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition. [Citations.] Critically, however, cohabitants need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances. Thus, while cohabitants have no cause to complain of searches that are reasonably and objectively related to the purposes of probation -- for example, when routine monitoring occurs [citation] or when facts known to the police indicate

> a possible probation violation that would justify' action pursuant to a known search clause [citation] – they may legitimately challenge those searches that are not. *Tyrell J.*, which focused specifically on the reasonableness of a probationer's privacy expectations, does not indicate otherwise.

(*People v. Robles, supra*, 23 Cal.4th at pp. 798-799.)

While *Robles* involved a probation search and the instant case involves a parole search, once again appellant Sanders perceives no difference as far as its application here except that consent is not available as a rationale for the search. Like *Martinez*, *Robles* stands for the proposition that for there to be a legitimate search based upon a search condition, the officers must be aware of the search condition. Otherwise, the search is not related to a legitimate probation or parole purpose and is arbitrary. Indeed, *Robles* appears to make this very point:

Allowing the People to validate a warrantless residential search,

> after the fact, by means of showing a sufficient connection between the residence and any one of a number of occupants who happens to be subject to a search clause, would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later. It also would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification.

(*Id.* at p. 800.) As the court below correctly observed:

> ... McDaniel's parole status cannot be used to validate the search with regard to Sanders. Sanders had a reasonable expectation of privacy in her residence. Further, the search was not conducted pursuant to a known search clause, and was not motivated by

> rehabilitative, reformative or legitimate law enforcement or parole purposes. Therefore, the search cannot stand as a valid parole search with respect to her. The People appropriately concede this in their supplemental brief.

(*People v. Sanders* (2000) reprinted at 84 Cal.App.4th 1211, 1228.)

Here, appellant Sanders, who was not on parole or subject to a search condition, was in her residence at the time of the unconsented to police intrusion. The record contains no evidence she was even aware McDaniel was on parole. Yet, in spite of respondent's concession Ms. Sanders had a reasonable expectation of privacy in the premises and the search was unlawful as to her, respondent still maintains, "because she shared the apartment with McDaniel, she had a reduced expectation of privacy." (RBOM 20.) Respondent's assertion begs the question of how one can have a reduced expectation of privacy without knowledge a cohabitant is subject to a search condition.

Absent evidence appellant Sanders knew of McDaniel's search condition, there is no basis for an argument she knowingly and voluntarily assumed any risk of a search by being a cohabitant of the residence. The rationale for justifying suspicionless searches of parolees is that "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored." (*People v. Reyes, supra*, 19 Cal.4th at p. 753.) Without knowledge that a cohabitant is on parole and is subject to a search condition, that rationale can have no application to the cohabitant. Accordingly, in addition to the rationale advanced by respondent, there is another reasonable basis for distinguishing between a parolee who is subject to a search condition and a cohabitant unaware of the search condition.

Respondent cites *Russi v. Superior Court* (1973) 33 Cal.App.3d 160 for the proposition that it would make no

difference whether a person who resides with a person subject to a search condition was aware of the search condition or not. (RBOM 20-21.) *Russi* contains the following language:

> Whether or not petitioner knew of the probationary condition is also irrelevant because just as his cotenant could not limit his right to possess and enjoy (or relinquish) the whole or any part of the common property [citation] he cannot limit her coexistent and coequal rights. If the cotenancy had existed at the time she gave her consent, he could not have prevented her action by the claim that his civil rights might be affected thereby. If he subsequently assumed his relationship with the probationer, his newly acquired status did not create a right for him to limit the effect of the consent already given. If the entry was valid as to Miss Reed, his lack of knowledge of the existence of the limitation of privacy that attached to the common residence, does not serve to create an abuse of police power and transform lawful police activity to the unreasonable and lawless activity that effectuates the constitutionally compelled rules of exclusion.

(*Id.* at p. 171.) The probationer in *Russi* had agreed to a search condition and the officers were aware of the search condition. (*Id.* at p. 164.) The language quoted above makes it clear that it was the probationer who effectively gave advance consent to the officers' search of the residence. This is consistent with *People v. Woods, supra*, 21 Cal.4th 668, which holds such a search is justified on the basis that the probationer, having common authority over the premises, may consent to the search in advance.[7] (*Id.* 21 Cal.4th at pp. 675-676.) The *Russi* language

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7. As noted above, the consent theory for a probation search insofar as it applies to a probationer now appears to be irrelevant in light of *United States v. Knights, supra*, which

respondent relies on is thus dicta, and not essential to the holding of the case. In any event, the relevant inquiry for one who is not subject to a search condition who lives with a person who is subject to a search condition is whether there is a reasonable expectation of privacy in the premises that society is prepared to recognize as reasonable. (See *California v. Ciraolo, supra*, 476 U.S. 207, 211.) It is axiomatic that a person has a reasonable expectation of privacy in his or her residence. (See *People v. Robles, supra*, 23 Cal.4th at p.795.) Absent knowledge that a cohabitant is subject to a search condition, that expectation of privacy remains reasonable, undiminished and one that society, and this court, should recognize as reasonable. Given the totality of the circumstances here present, the search as applied to appellant Sanders was unreasonable under the Fourth Amendment.

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upholds a probation search under the theory it is reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, appellant Sanders prays that this court affirm the decision of the Court of Appeal. Specifically, appellant Sanders urges the court to overrule its decision of *Tyrell J.*, *supra*, and to reaffirm the rule of *In re Martinez*, *supra*. Should this court find that *Tyrell J.* is still viable, appellant urges the court to find the holding is not applicable to parole searches taking place in one's home, and to extend the rule of *People v. Robles, supra*, to such searches. Finally, should the court rule that *Tyrell J.* applies to adult parolees, the court should hold that *Tyrell J.* may not be used to sanction the search of a person's residence who lives with a parolee absent evidence that the person is aware of the cohabitant's parole status.

Respectfully submitted,

Dated: July 17, 2002

[Signature]
J. Peter Axelrod

Attorney for Appellant
Arlene Dena Sanders

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is PMB 341, 1275 Fourth Street, Santa Rosa, California, 95404. On July 18, 2002, I served the attached **APPELLANT ARLENE DENA SANDERS ANSWER BRIEF ON THE MERITS** by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelopes in the United States Mail at Santa Rosa, California, with postage thereon fully prepaid. There is delivery service by the United States Postal Service at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 18, 2002 at Santa Rosa, California.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ARLENE DENA SANDERS, et al. Defendants and Appellants.	S094088

APPELLANT MCDANIEL'S RESPONSE BRIEF ON THE MERITS

INTRODUCTION

In the court of appeal, appellants Arlene Sanders and Kenton McDaniel successfully challenged the denial of their motion to suppress illegally seized evidenced. This court has granted review in order to resolve the question of whether an otherwise unlawful warrantless search of a private residence may later be justified by the fact that a parolee resides in that home, even if the police were unaware of the resident's parole status at the time of the search. Appellant McDaniel urges this court to take this opportunity to overrule the untenable decision in *In re Tyrell J.* (1994) 8 Cal.4th 68. At a minimum, this court should restrict *Tyrell J.* to the facts presented in that case, and extend the protections of *People v. Robles* (2000) 23 Cal.4th 789 to parolees and their families.

ISSUES PRESENTED

This court has requested that the parties brief three issues.

(1) Whether this court should reconsider the holding of *In re Tyrell J.*, *supra*, 8 Cal.4th 68, 74, that an otherwise illegal search of a minor who is subject to a probation search condition is not unconstitutional despite the officer's ignorance of the search condition?

(2) If this court's holding in *Tyrell J.* remains viable, should it apply to adult parolees who are subject to search conditions?

(3) Under this court's previous decision in *People v. Robles, supra*, 23 Cal.4th 789, does the admissibility of the fruits of the search in the present case differ as to defendant Sanders, who was not subject to a search condition, as compared to defendant McDaniel, who was?

STATEMENT OF THE CASE

On May 17, 1999, appellants Kenton McDaniel and Arlene Sanders were charged by Kern County information number 77313 with possession of cocaine base for sale (Health & Saf. Code, sec. 11351.5), on April 6, 1999. (CT 50, 52.)[1/] As to McDaniel only, the information alleged that he had been previously convicted of the same offense on May 9, 1997, within the meaning of Health and Safety Code section 11351.5. (CT 51.)

On May 26, 1999, appellant Sanders moved under Penal Code section 1538.5 to suppress illegally seized evidence. (CT 56.) On June 1, 1999, counsel for McDaniel joined in that motion and filed a supplemental motion on McDaniel's behalf. (SCT 5, 7.) Following a hearing, both motions were denied on June 24, 1999. (SCT 11-13.)

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1. "'CT" refers to the clerk's transcript on appeal; "SCT" refers to the supplemental clerk's transcript. "RT" refers to the reporter's transcript.

On June 25, 1999, McDaniel pleaded guilty to the charged offense in exchange for a sentence of no more than five years in prison. As part of this agreement, the prior conviction allegation was stricken. (SCT 16-17.)

On August 12, 1999, the court denied probation and sentenced McDaniel to five years in prison. (SCT 21.) On August 31, 1999, McDaniel filed timely notice of appeal. (SCT 25.)

On November 20, 2000, the Fifth District Court of Appeal reversed the convictions of both Sanders and McDaniel, finding that the search of their apartment violated the Fourth Amendment to the United States Constitution. This court granted review on February 26, 2001.

STATEMENT OF FACTS

Appellant McDaniel adopts the following statement of facts recounted in the opinion of the Court of Appeal, summarizing the testimony from the hearing on the motion to suppress:

"On April 6, 1999, Charlotte McKinley was the apartment manager of a complex located at 1905 California Avenue in Bakersfield. That day,

"On April 6, 1999, Charlotte McKinley was the apartment manager of a complex located at 1905 California Avenue in Bakersfield. That day, the residents of apartment 17 informed McKinley that there was a disturbance in apartment 18. McKinley proceeded to call the police.

"Bakersfield police officer Glen Davis responded with Officer Scott Thatcher. Upon arriving, Davis and Thatcher first met with McKinley, who directed them to apartment 18. When they got to the door, Davis and McKinley heard a male and female yelling at each other. Thatcher knocked on the door, and after a short time, someone inside looked out through the blinds, after which the arguing stopped. Davis and McKinley next heard the sound of the deadbolt lock, but the door was not opened. After waiting 15-30 seconds, Thatcher knocked again,

announced the presence of the police, and ordered the door be opened immediately. Another 15-30 seconds passed, the officers heard the deadbolt lock mechanism again engage, and the door was opened.

"Thatcher informed Davis that he observed a cut on Sanders' face, and saw McDaniel standing behind her. Davis described the cut as a "small abrasion[,] like a scrape," and testified the cut looked fresh. The two officers entered the apartment, at which point McDaniel was seen taking his hand out from between the couch cushions. Sanders then very quickly advised the police they were not welcome, stating, "What the fuck you all doing in my house? Get the fuck out of my house." Sanders subsequently began grappling with Thatcher. McDaniel walked toward Thatcher, advising him to leave Sanders alone, but Davis intervened, pressing McDaniel against the wall, and telling him to stay out of the situation. McDaniel attempted to push away from Davis a few times, so Davis handcuffed him. Shortly thereafter, Thatcher handcuffed Sanders.

"After both defendants were handcuffed, Davis made a protective sweep of the apartment to make sure there was no one else in the apartment that could endanger his or Thatcher's safety. Davis looked through the living room, kitchen, bathroom, and two bedrooms, limiting his search to areas where a person could be hiding. There was an open closet in one of the bedrooms. Inside the closet, in plain view, Davis observed a pair of brown work boots, one of which had a large amount of plastic bags stuffed inside with small white chunks of cocaine base knotted into the corners. Davis did not seize the items at this time, but rather continued his protective sweep.

"Once the sweep was completed, Davis called police department communication to obtain McDaniel's parole status. After it was determined that McDaniel was on parole, and subject to search, Davis called for a K-9 unit, and another two-man unit to assist in a search of the apartment. apartment door. A pair of stainless-steel-plated scissors, seven inches in length, was retrieved from between the couch cushions. A total of 4.72 grams of cocaine, as well as a gram scale, $390 cash,

and a pager, were seized from the apartment.

"Sanders testified the blemish on her face was the result of numerous fights she had been in previously, and the scar on her face was there long before April 6, 1999. Sanders denied receiving the blemish as a result of a fight with McDaniel. Sanders also testified she could not recall telling the police that she received the scratch on the day of the incident, or that it was a result of running away from McDaniel and falling against a stucco wall. Sanders did not receive medical treatment for her injury." (Slip op., pp. 3-5.)

ARGUMENT

I.

THE RATIONALE OF *IN RE TYRELL J.* HAS BEEN ERODED BY SUBSEQUENT DECISIONS OF BOTH THIS COURT AND THE UNITED STATES SUPREME COURT, AND SHOULD BE OVERRULED

The court has asked the parties to address the issue of whether the court should reverse the holding of *In re Tyrell J.* (1994) 8 Cal.4th 68, in which this court held that a warrantless search conducted without reasonable suspicion may withstand Fourth Amendment scrutiny if the defendant was subject to an involuntary search condition, even if the searching officer was unaware of that search condition. Strongly criticized at the time that it was decided,[2/] the *Tyrell J.* opinion has been further

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2. See, e.g., *In re Tyrell J, supra*, 8 Cal.4th at pp. 90-99, dis. opn. of Kennard, J.; *People v. Robles* (2000) 23 Cal.4th 789, 802-803, conc. opn. of Kennard, J.; *People v. Robles, supra*, 23 Cal.4th at pp. 803-806, conc. opn. of Brown, J.; 4 LaFave, Search and Seizure (3d ed. 1996) § 10.10(e) pp. 791 -792; *Fourth Amendment Protection for Juvenile Probationers in Calfornia, Slim or None?: In re Tyrell J.* (1995) 22 Hastings

undermined by subsequent decisions at both the state and federal level. For the reasons that follow, this court should abandon *Tyrell J.* 's focus on the defendant's subjective expectation of privacy and adopt the more commonly accepted standard of objective reasonableness for parole searches. At the very minimum, this court should overrule *Tyrell J.* to the extent that it purports to legitimize otherwise unreasonable searches undertaken by officers who do not even know of the defendant's parole status.

A. The recent decision of the United States Supreme Court in *United States v. Knights* compels a return to the pre-*Tyrell J.* requirement that parole searches be accompanied by reasonable suspicion

During the past fifteen years, this court has attempted on multiple occasions to craft a cohesive jurisprudence regarding the Fourth Amendment rights retained by probationers and parolees subject to search conditions. With the exception of the 1987 decision in *Griffin v. Wisconsin* (1987) 483 U.S. 868 [97 L.Ed.2d 709; 107 S.Ct. 3164], the court has acted without specific guidance from' the United States Supreme Court.

In December of 2001, however, the United States Supreme Court reviewed a California probationer's search condition in *United Sates v. Knight* (2001) 534 U.S. 112 [151 L.Ed.2d 497; 122 S.Ct. 587]. Although the court in that case ruled that the warrantless probation search at issue was supported by reasonable suspicion and was consistent with the Fourth Amendment, in so holding the court articulated a balancing test that calls into question this court's holdings in *Tyrell J.* and

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Const. L.Q. 893; *In re Tyrell J.*: *Calfornia 's Application of Search and Seizure Limitations to Juvenile Probationers* (1995) 21 J. Contemp. L 307; *Fourth Amendment Protections for the Juvenile Probationer after In re Tyrell J.* (1996) 36 Santa Clara L. Rev. 865; *In re Tyrell J.*: *Children and Their Reasonable Expectations of Privacy* (1995) 25 Golden Gate U.L. Rev. 391.

People v. Reyes (1998) 19 Cal.4th 743. In light of the Supreme Court's reaffirmation of the totality of the circumstances balancing test abandoned by this court in *Tyrell J.*, the time is ripe for a reevaluation of California law.

1. The law prior to *Tyrell J.*

This court first addressed parole searches in the context of the determinate sentencing law in *People v. Burgener* (1986) 41 Cal.3d 505. In upholding a warrantless search supported only by reasonable suspicion, the court rejected both the consent rationale (*People v. Mason* (1971) 5 Cal.3d 759, 765-766; *People v. Icenogle* (1977) 71 Cal.App.3d 576, 583-586) and the "custodia legis" or continuing custody rationale (*People v. Howard* (1978) 79 Cal.App.3d 46, 49; *People v. Hernandez* (1964) 229 Cal.App.2d 143) for warrantless parole searches.

Instead, the court adopted the balancing approach formulated in *Hudson v. Palmer* (1984) 468 U.S. 517 [104 S.Ct. 3194; 82 L.Ed.2d 393]. Noting that both parolees and probationers have a reduced expectation of privacy relative to other members of the community (while still retaining a much greater privacy interest than that retained by prisoners), the court struck a "balance between individual and societal interests in light of the parolee's current status in the community." (*People v. Burgener, supra*, 41 Cal.3d at pp. 530-531.)

In terms of societal interests, the court focused on the Legislature's stated concern with the period following incarceration as" 'critical to successful reintegration of the offender into society,' " and on the state's interest in" 'imposing extensive restrictions' "on the liberty of one who has been found guilty of a crime against the people. (*People v. Burgener, supra*, 41 Cal.3d at p. 531.) The court concluded that the importance of the state's interest in effective parole supervision justified conducting parole searches without warrants and upon a level of suspicion not amounting to probable cause. (*Id.*, at p. 534.)

The court did not go so far as to hold that a parolee retains *no* expectation of privacy, however: "To say that a parolee is

subject to warrantless search is not to say that his privacy interest is so diminished that random searches or searches unrelated to a proper parole supervision purpose are reasonable and constitutionally permissible." (*Id.*, at p. 533.) The court held that because the justification for warrantless parole searches was the need for effective parole supervision, any search conducted pursuant to a person's parole status "must be based on information which leads the parole agent who conducts or authorizes the search to believe that the parolee has violated the law or another condition of his parole, or is planning to do so." (*Ibid.*) In sum, a parole search under *Burgener* had to be directly and closely related to parole supervision, and supported by at least a reasonable suspicion that the parolee had violated the law.

The *Burgener* holding was followed within a year by the United States Supreme Court ruling in *Griffin v. Wisconsin, supra*. The court in that case considered a Wisconsin regulation permitting warrantless searches of probationers' homes based only on a reasonable suspicion. At the outset of its discussion, the court recognized that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment requirement that searches be reasonable." (*Griffin v. Wisconsin, supra,* 483 U.S. at p. 873;) At the same time, the court cautioned that probationers and parolees are considered "more likely than the ordinary citizen to violate the law." (*Id.*, at p. 880.) The danger of recidivism, and the probation system's goal of rehabilitation, present "special needs, beyond the normal need for law enforcement." (*Id.*, at p. 873.) Such special needs may justify "a degree of impingement upon privacy that would not be constitutional if applied to the public at large." (*Id.*, at p. 875.) The court thus upheld the Wisconsin regulation under what came to be known as the "special needs" exception to the warrant requirement. (*Id.*, at p. 880.)

The *Griffin* "special needs" evaluation was not inconsistent with the balancing test employed by this court in *Burgener*. The next California case on the subject, however, was handed down just two weeks after the *Griffin* decision, and diverged from the

"special needs" analysis as well as from this court's own precedent in *Burgener*. In *People v. Bravo* (1987) 43 Cal.3d 600, this court distinguished consent-based probation searches from nonconsensual parole searches. Focusing on the probationer's reasonable expectation of privacy rather than on the competing needs of society and the individual, the court found that a defendant who agrees to warrantless searches as a condition of probation has not only relinquished the right to demand a warrant, but also "whatever claims of privacy he might otherwise have had." (*Id.*, at p. 610.) The balancing test of *Burgener*, therefore, had no application to probation searches. Given the nearly complete absence of any expectation of privacy by a probationer who had consented to a search condition, the court held that not only could such searches be undertaken without a warrant, but without any reasonable suspicion of wrongdoing. (*Id.*, at p. . 610.)

Thus, when this court decided *Tyrell J.* in 1994, a clear distinction was in effect between the Fourth Amendment rights of parolees and those of probationers. In evaluating the former, this court employed a balancing test not unlike the one adopted by the United States Supreme Court in *Griffin*, in order to determine what quantum of suspicion was required to satisfy the Fourth Amendment where the state evinces special needs for a standard lower than probable cause. In regard to the latter, however, the court instead focused on the expectation of privacy retained by probationers, and found that probationers lacked standing to challenge any search that was not arbitrary, capricious, or harassing.

2. The *Tyrell J.* decision

Tyrell J. presented a legal and factual situation distinct from either *Burgener* or *Bravo*. *Tyrell J.* involved a police officer's search of a minor probationer, undertaken without reasonable suspicion and without knowledge that the minor was subject to a search condition. This court began its discussion by acknowledging the distinction between juvenile and adult

probation. Whereas adult probation is considered an act of leniency to which the defendant voluntarily consents, juvenile probation constitutes a key component of the juvenile court system's reformative and rehabilitative process. (*In re Tyrell J*, *supra*, 8 Cal.4th at pp. 81-82.) Unlike an adult defendant, moreover, a juvenile lacks the option of refusing a probation condition. (*Id.*, at p. 83.) Thus, this court could not and did not rely on the "advance consent" rationale of *Bravo* to uphold the legality of the search in question. (*Ibid.*)

The court likewise found the "special needs" analysis of *Griffin* to be unavailing in this instance, because none of the three factors used to uphold the search condition in *Griffin* was present in *Tyrell J.* Specifically, the factors relied upon by the *Griffin* court were a condition imposed by a state regulation, the necessity of approval for the search by the probation officer's supervisor, and a requirement of reasonable cause to conduct a search. Acknowledging that the search condition imposed upon the minor in *Tyrell J.* was imposed by the juvenile court rather than by a statutory scheme, did not require supervisorial approval, and could be undertaken without reasonable cause pursuant to *Bravo*, the court declined to uphold the search under the *Griffin* test. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 78.)

Nonetheless, the court went on to uphold the search, on the theory that "a juvenile probationer subject to a valid search condition does not have a reasonable expectation of privacy over his or her person or property." (*Id.*, at p. 86.) The court reached this unprecedented conclusion by the circular reasoning that since the minor knew that police could randomly search him at any time, he lacked any reasonable expectation of privacy, and that since he lacked any reasonable expectation of privacy, police could search him at any time without reasonable suspicion and without any knowledge of his probation condition. (*Id.*, at p. 89.)

The majority's gauging of the Fourth Amendment inquiry from the vantage point of the minor's expectations was immediately assailed in Justice Kennard's dissent as a "startling departure from settled principles underlying the Fourth

Amendment" that "erodes the credibility of the constitutional prohibition against unreasonable searches and seizures." (*Id.* at p. 43, dis. opn. of Kennard, J.) More recently, Justice Brown also criticized the *Tyrell J.* opinion's divergence from standard Fourth Amendment jurisprudence, arguing that "[t]he flaw of *Tyrell J.* is that it puts the reasonable expectation of privacy cart before the horse." (*People v. Robles*, *supra*, 23 Cal.4th 789, 805, dis. opn. of Brown, J.)

Other commentators have likewise found fault with the syllogism employed in *Tyrell J.*:

> [Q]uite obviously there is no rational basis upon which to uphold otherwise illegal police searches of persons only later determined to be on probation or parole ... Regrettably, that eminently sound position was later abandoned in *In re Tyrell J.* on the bizarre reasoning that a probationer who knows that he is subject to "a valid search condition" to his release consequently "does not have a reasonable expectation of privacy over his person or property" vis-a-vis a search by anyone, including a search by a police officer unaware of the probationer status! (4 LaFave, Search and Seizure, *supra*, § 10.10(e), pp. 79 1-792.)

Given the nearly universal criticism by legal scholars and the lack of explicit or implicit endorsement by the United States Supreme Court, the time is ripe for this court to reconsider *Tyrell J.*

3. Legal Developments after *Tyrell J.*

The shift in approach reflected by *Tyrell J.* paved the way for this court's decision in *People v. Reyes* (1998) 19 Cal.4th 743. In *Reyes*, defendant's parole officer received an anonymous tip that defendant was using drugs. The court of appeal reversed the conviction on the grounds that the search was not supported by reasonable cause. On review, this court overruled *Burgener*

and abandoned the reasonable suspicion standard previously applied to adult parole searches. As in *Tyrell J.*, the court based its decision on the parolee's diminished expectation of privacy, holding that a parolee's right to be free from suspicionless searches is not one which "society is willing to recognize as legitimate." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751.)

After determining that the United States Supreme Court in *Griffin* had not held that reasonable suspicion was necessarily required in a warrantless parole search (*Id.*, at p. 747), the court next looked to the line of state cases and concluded that the "contextual approach" employed in Tyrell J. was preferable to the rigid formulations of earlier cases. (*Id.*, at p. 750.) Specifically, the court rejected both the consent model of *Bravo* and the careful balancing of interests employed in *Burgener*. "Unlike *Burgener*, which sought to calibrate precisely what level of suspicion could reasonably substitute for probable cause, *Tyrell J.* considered what expectation of privacy could reasonably trigger a requirement for individualized suspicion." (*Ibid.*)

The court once again employed the logic of *Tyrell J.*, noting that, like juvenile probationers, adult parolees already possess a reduced expectation of privacy by virtue of the fact that they are subject to warrantless searches. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 752.) The court found that the threat of a suspicionless search is a reasonable measure to ensure public safety and otherwise effectuate the purposes of parole, and concluded that this compelling need for government intrusion "diminishes any reasonable expectation of privacy." (*Ibid.*) Again, the logic went, societal interests permit parolees to be searched without particularized suspicion; therefore, "even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society "is prepared to recognize as legitimate." ' [Citations omitted.]" (*Id.*, at p. 754.) Just as in *Tyrell J.*, the conclusion was that because a parolee could be searched at any time, he had no legitimate expectation of privacy, and because he had no

legitimate expectation of privacy, he could be searched at any time.

Once again, Justice Kennard dissented. Citing *Burgener*, she noted at the outset that parole searches are administrative searches and thus subject to the broad reasonableness requirements of the Fourth Amendment. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 758, dis. opn. of Kennard, J.) Furthermore, she pointed out, the United States Supreme Court has *never* upheld a probation or parole search upon less than reasonable suspicion: "The United States Supreme Court has never held that the Fourth Amendment to the federal Constitution permits warrantless, nonconsensual government searches of private residences without at least reasonable suspicion." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 759, dis. opn. of Kennard, J.) The balancing test employed in *Burgener* was derived from *Griffin*; employing a similar test, the vast majority of other American jurisdictions had retained the requirement of reasonable particularized suspicion for parole searches. (*Id.*, at p. 760, dis. opn. of Kennard, J.)

Justice Werdeger likewise dissented in *People v. Reyes*. Notably, she pointed out that the *Burgener* court had also examined the adult parolee's reasonable expectation of privacy, and had found that such expectation was limited but not absent. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 768, dis. opn. of Werdeger, J.) In contrast with the approach taken by the court in *Tyrell J.* and *Reyes*, however, the earlier decision had incorporated the lowered expectation of privacy into the overall balancing of interests, instead of determining that the reduced expectation answered the entire Fourth Amendment question before the court. (*Ibid.*)

More recently, in her concurring opinion in *People v. Robles*, *supra*, 23 Cal.4th 789, Justice Brown (who authored the *Reyes* opinion) pointed out the danger involved in the overemphasis and circular reasoning derived from *Tyrell J.* Responding to a remark by the Attorney General that upholding the search in *Robles* (a warrantless, suspicionless search of a suspect that was later justified by the discovery that his cotenant

was on searchable probation) would follow the "logical application" of the court's decisions from *Tyrell J.* onward, Justice Brown expressed concern at the direction in which the decisional law appeared to have been headed. Since the probationer had consented to a search of the residence at the time he accepted his probation conditions, the Attorney General argued that the cotenant had assumed the risk of third party consent and had no reasonable expectation of privacy. "The officer's ignorance of the search condition, or even of [the cotenant's] probationary status, was thus immaterial. QED." (*People v. Robles*, *supra*, 23 Cal.4th 789, 803, conc. opn. of Brown, J.)

Justice Brown called this assessment "as syllogistically accurate as it is constitutionally shocking." (*Id.*, at p. 804, conc. opn. of Brown, J.) Further, she argued, the contention "speaks volumes to how far this court's Fourth Amendment methodology has strayed from the core rationale of the guarantee against unreasonable searches and seizures." (*Ibid.*) Her major disagreement with that methodology focuses on the overemphasis of the two-part inquiry regarding a defendant's reasonable expectation of privacy, an inquiry originally derived from Justice Harlan's concurring opinion in *Katz v. United States* (1967) 389 U.S. 347, 360 [88 S.Ct. 507, 516; 19 L.Ed.2d 576] (conc. opn. of Harlan, J.). That inquiry was originally intended to determine the defendant's privacy interest in a physical location, and its application has primarily been focused on that question. (See *People v. Robles*, *supra*, 23 Cal.4th at p. 804, conc. opn. of Brown, J., and citations therein.) The guidance of *Katz* in "defining the scope of the interest protected by the Fourth Amendment" (*Rakas v. Illinois* (1978) 439 U.S. 128, 143 [99 S.Ct. 421, 430; 58 L.Ed.2d 387]) is a guidance as to the *spatial* scope of that interest. (*People v. Robles*, *supra*, 23 Cal.4th at p. 805, conc. opn. of Brown, J.)

While acknowledging that the reasonable expectation of privacy has *some* bearing outside the relatively narrow realm of the *Katz* analysis, Justice Brown nonetheless criticized *Tyrell J.* for "succumbing to the trap of the facile formula that

beguilingly substitutes for critical analysis." (*People v. Robles*, *supra*, 23 Cal.4th at p. 806, conc. opn. of Brown, J.) The inquiry into the defendant's reasonable expectation of privacy, she insisted, "does not define the inquiry into the reasonableness of the search ... because that inquiry looks first to the officer's conduct under the circumstances." (*Ibid.*)

4. The *Knights* decision

In December of 2001, the federal high court at last weighed in on the probation/parole search issue in California, upholding a warrantless search of a California probationer where the search was supported by reasonable suspicion of criminal activity and authorized by a search condition. (*United States v. Knights*, *supra*, 534 U.S. 112 [122 S.Ct. 587; 151 L.Ed.2d 497].) The court first rejected defendant's argument that a warrantless search of a probationer satisfies the Fourth Amendment only if the search constitutes a "special needs" search a la *Griffin*, conducted by a probation officer monitoring the defendant's compliance with probation conditions. (*United States v. Knights, supra*, 151 L.Ed.2d at pp. 590-591.) The court likewise declined to address the government's argument that the defendant's consent to the search condition amounted to "consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights." (*Id.*, 151 L.Ed.2d at pp. 504-505, citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218 [93 S.Ct. 2041; 36 L.Ed.2d 854].) Instead, the court concluded that "the search of *Knights* was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' ... with the probation search condition being a salient circumstance." (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 505.)

The actual holding in *Knights* would not appear at first glance to have great implications for California law in this area, as the court declined to reach the question of whether reasonable suspicion is required for a probation or parole search, and instead merely upheld a search that would have been

permissible in California under *People v. Bravo* and subsequent decisions. The reasoning employed by the court to reach its conclusion, however, is of great importance to this court as it deliberates the fate of *Tyrell J.* and the cases that have followed that decision. This importance stems not from the result reached in *Knights*, but from the process the court used to get to that result, i.e., a reasonableness inquiry assessing the totality of the circumstances, in which the probationer's diminished expectation of privacy was but one factor considered by the court in weighing the interests of society and of the probationer. Such a balancing test was used by this court in *Burgener*; the same approach was strenuously urged upon the court by the dissenters in *Reyes* and *Woods* (*People v. Woods* (1999) 21 Cal.4th 668, cert den, sub nom. *Woods v. California* (2000) 529 U.S. 1023 [120 S.Ct. 1429; 146 L.Ed.2d 319]) and by the concurring opinions in *Robles*. This same balancing test and totality of the circumstances inquiry was abandoned by this court in *Tyrell J.*

In fact, the *Knights* court, like this court in *Burgener*, used the totality of the circumstances test to "calibrate precisely what level of suspicion could reasonably substitute for probable cause," the very approach criticized by this court in *Reyes*. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 750.) Considering the government interest in closely regulating probationers both to integrate them back into society and to monitor their enhanced likelihood of engaging in criminal activity against the probationer's diminished expectation of privacy, the court concluded that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. *The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable.*" (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 592; emphasis added.)

The United States Supreme Court's emphasis on reasonableness and the totality of the circumstances is a far

more useful and logical approach than the syllogism with which this court has struggled since its adoption *in Tyrell J.* As will be seen in subsequent portions of this brief, the *Tyrell J.* analysis has already been abandoned to some extent by this court, largely because that analysis has led to the sort of conclusions that Justice Brown termed "constitutionally shocking" in her concurring opinion in *People v. Robles*. Thus, this court should seize this opportunity to overrule *Tyrell J.* and return to the reasonableness inquiry employed under *Burgener*.

As the United States Supreme Court has repeatedly counseled, the touchstone of Fourth Amendment analysis is whether the search at issue is reasonable under the totality of the circumstances. This court concluded in *Burgener* that the competing interests of the parolee versus the interests of the government in monitoring people released from prison permitted a warrantless search upon reasonable suspicion. (*People v. Burgener*, *supra*, 41 Cal.3rd at pp. 530-531.) Reasonable suspicion is likewise the only quantum of proof ever expressly permitted by the United States Supreme court for a warrantless probation or parole search. As Justice Werdeger noted in her concurring and dissenting opinion in *Reyes*, the majority opinion in that case "does not adequately explain why, 12 years ago in *Burgener*, adult parolees enjoyed a greater deal of privacy than they do today." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 768, conc. opn. of Werdeger, J.) The opinion in that case did not explain that change because it was not the level of privacy that changed, but only the court's emphasis on that expectation of privacy.

As will be seen in subsequent portions of this brief, the logical path charted in *Tyrell J.* has proven difficult to navigate in subsequent cases. The *Tyrell J.* opinion is not simply problematic, however; it is wrong. The reasonableness inquiry required under the Fourth Amendment requires an inquiry into the totality of the circumstances, not a simplistic and circular assessment of an individual's subjective privacy interests. This court should follow the guidance of *Griffin* and *Knights* and return to the totality of the circumstances inquiry required by

the Fourth Amendment. In so doing, this court should overrule *Tyrell J.* and abandon that case's flawed reasoning.

B. Even if this court declines to return to the pre-*Tyrell J.* requirement that parole searches be accompanied by reasonable suspicion, it should overrule *Tyrell J.* at least insofar as it permits searches undertaken without knowledge of the defendant's parole status.

While the reasoning in *Knights* would seem to compel a reevaluation of *Tyrell J.* and the cases that have relied on that decision, this court does not have to completely overrule *Tyrell J.* in order to uphold the court of appeal's decision in this case. Instead, this court can continue upon the course it charted in *People v. Robles*, and limit the decision in this case to overruling *Tyrell J.* only insofar as it applies to parole conditions of which the police were unaware at the time of the search. Indeed, any other result would create an irreconcilable conflict with this court's own recent precedent.

Probation and parole searches have historically been given special status under the Fourth Amendment because courts believe that permitting such searches upon a showing of less than probable cause furthers both the societal protection and rehabilitation goals of probation and parole. For instance, part of the balancing test employed by this court in *Burgener* and reiterated in *Bravo* involved a consideration of whether the warrantless search at issue is conducted for a purpose that furthers the purposes of parole or probation supervision. (*People v. Burgener*, *supra*, 41 Cal.3d at pp. 533-534; *People v. Bravo*, *supra*, 43 Cal.3d at p. 610.) More recently, although the federal court in *Knights* held that the Fourth Amendment does not require that a search pursuant to a probation condition be conducted fora "probationary purpose," the court's finding that the search was reasonable under the totality of the circumstances was largely based on the state's need to supervise, monitor, and rehabilitate probationers. Although the search in

that case related to investigation of a new offense, the court focused on the state's need to more closely monitor probationers because they are more likely to commit new offenses than are other citizens. (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 506.) Thus, even in *Knights*, the court did consider whether the search furthered the very interests that permitted its warrantless execution.

By contrast, there can be no furtherance of probation or parole supervisory interests where the officer conducting the search does not even know of the existing search condition. This court acknowledged this in *People v. Robles*, citing *Bravo* for the proposition that even a search undertaken pursuant to a consensual probation condition must be reasonably related to the purposes of probation. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797, citing *People v. Bravo*, *supra*, 43 Cal.3d at p. 610.) *Robles* involved a search of the suspect's residence, conducted without a warrant and without the suspect's consent. After the search, police learned that the suspect's brother, who resided with him, was currently on searchable probation. In finding that the search violated the Fourth Amendment and that it could not be justified by the previously undiscovered search condition, this court concluded that "a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence." (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.)

The decision in *People v. Robles* marked the first time that a majority of this court broke from the strict reasonable expectation of privacy analysis articulated in *Bravo* and in *Tyrell J.* In fact, just a year before the *Robles* decision, the court upheld the conviction of a non-probationer on the ground that the warrantless search of her home was justified by her cotenant's probation search condition, and that the non-probationer lacked an expectation of privacy in shared portions of the home. (*People v. Woods*, *supra*, 21 Cal.4th 668.) Under the facts of that case, the investigating officer had received information that the probationer's boyfriend was

selling drugs out of their shared home. The officer later observed suspicious behavior by the boyfriend, leading to the boyfriend's arrest. The officer then returned to the home and searched it pursuant to the girlfriend's probation condition. (*Id.*, at pp. 681-682.)

In upholding the search and subsequent conviction of the probationer's roommates, this court cited *Bravo* in noting that authority fora consent search arises from the probationer's consent. (*People v. Woods, supra*, 21 Cal.4th at p. 674.) Where multiple parties occupy the same premises, any party may give consent to search areas of common control. Thus, this court reasoned, the cotenant assumes the risk that a roommate might authorize search of common areas. (*Id.*, at p. 676.) Significantly, however, the *Woods* opinion also noted that whatever the officer's motives might have been in that case, the objective evidence before the court showed that drugs and weapons were likely present in the probationer's house. These facts would have furnished ample justification for conducting a probation search; the court thus extended the United States Supreme Court's holding in *Whren v. United States* (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2d 89] to hold that the officer's subjective intent was irrelevant even where the search was based on less than probable cause. (*People v. Woods*, *supra*, 21 Cal.4th at p. 681.)

In *Robles*, this court explained its *Woods* decision by noting that under both cases, the inquiry is *whether the objective facts* show a proper probationary justification for the search. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.) If the answer is yes, the officer's subjective motives are irrelevant. In *Woods*, the officer conducted the probation search based on a known probation condition, and with knowledge of objective facts indicating that drugs would be found in the probationer's home. Conversely, where the objective facts demonstrate no plausible parole or probation purpose for the search, no knowledge of the search condition, and no other justification for the search, the search cannot be justified by a subsequently discovered search condition:

> [I]f officers lack knowledge of a probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.)

Although *Robles* acknowledged that *Tyrell J.* "declined to impose a strict requirement that the searching officer must always have advance knowledge of a search condition," the court distinguished *Tyrell J.* only insofar as that case applied to the probationer himself rather than to a cotenant. (*Id.*, at p. 797-798.) This court did not suggest that a different standard should apply to juveniles or parolees, only that *Tyrell J.* did not control the facts presented in *Robles* because the latter case involved a cotenant, and the cotenant of a probationer or parolee does not suffer the nearly absent expectation of privacy that *Tyrell J.* imposed upon juvenile probationers and adult parolees. (*Id.*, at p. 798.) For instance, cotenants retain a normal expectation of privacy over their persons and over areas that are under their exclusive control. (*Ibid.*, citing *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188-189 [111 L.Ed.2d 148].) Thus, *Tyrell J.* simply did not apply to the facts of *Robles*, so the court had no reason to address the older decision's continued validity.

Despite this distinction, the logic of *Robles* does apply to an adult parolee or a juvenile probationer as well as to adults on probation. A parole search under *Tyrell J.* or *Reyes* is subject to the same limitation as a probation search under *Bravo*, i.e., it must not be undertaken for harassment or for reasons that are wholly arbitrarily. This court in *Reyes* noted that" 'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' [Citation.]" (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) The *Reyes* court defined an arbitrary or capricious search as one undertaken"when the motivation for the search is unrelated to

rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee." (*Id.*, at p. 754.) By comparison, *Robles* has defined a warrantless search undertaken without knowledge of the search condition as "wholly arbitrary" (*People v. Robles*, *supra*, 23 Cal.4th at p. 797), and such a search is no less arbitrary if the defendant is on parole rather than probation. Further, just as there can be no legitimate probation reason for conducting a search if the officer does not know that the suspect is on probation and subject to search, there can be no legitimate parole purpose for searching a person whom the officer does not know to be on parole.

The basic distinction which this court drew between the scenario in *Woods* and the scenario in *Robles* is sound. In the former case, the officers had an objectively reasonable basis for conducting a search, i.e., a known probation condition. In the latter case, the officers had no objectively reasonable basis for searching; the existence of the search condition was a fortuitous discovery that saved what would have otherwise amounted to a violation of the Fourth Amendment. (*People v. Robles*, *supra*, 23 Cal.3d at p. 799.) Given the exclusionary rule's purpose of deterring unlawful conduct by police, this court should maintain this reasonable distinction rather than adopting a different rule for parole searches.

Despite the Attorney General's apparent contention to the contrary,[3] this focus on the officer's knowledge does not amount to basing the Fourth Amendment determination on the officer's subjective state of mind. Rather, focusing on the objective facts known to the officer is consistent with settled Fourth Amendment law. In determining the reasonableness of a search undertaken without a warrant, the court may look only to those facts known to the officer at the time the search was made. (*People v. Talley* (1967) 65 Cal.2d 830, 835.) This is not an impermissible focus on the officer's motives or state of mind, but an entirely proper examination of the objective facts

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3. Respondent's Brief on the Merits, p. 11.

available to the officer at the time of the search, consistent with the purposes of the exclusionary rule.

This court should overrule *Tyrell J.* to the extent that it is inconsistent with the decision in *Robles*.

II.
EVEN IF THIS COURT DECLINES TO OVERRULE *TYRELL J.*, THE HOLDING OF THAT CASE MUST BE LIMITED TO PERSONAL SEARCHES OF JUVENILE PROBATIONERS

Although *Tyrell J.* has been criticized by many commentators and appears to rest on shaky constitutional ground, this court may affirm the court of appeal's holding in this case without reaching the continued merits of *Tyrell J.* That decision may be distinguished on both the facts and the law, and this court may decline to extend its authority to adult parolees.

This court has previously held that an unknown parole search condition cannot save what would otherwise be an illegal search. (*In re Martinez* (1970) 1 Cal.3d 641.) The Fifth District below, in fact, relied on *Martinez* in reversing the denial of appellants' suppression motion. In *Martinez*, the defendant challenged a parole revocation based on illegally seized evidence. In determining that the adult authority could not properly consider evidence obtained as a result of an unconstitutional search and seizure, this court addressed the fiction that a parolee remains under constructive custody. Focusing on "the reality of a parolee's conditional freedom" as opposed to the fiction that he remains in prison custody during parole, the court found that a later discovered parole condition could not justify an otherwise unlawful search:

> In the instant case regular police officers undertook the search pursuant to their general law enforcement duties; the officers, at the time of the search, did not even know of defendant's parole status. The

> investigation involved suspected criminal activity, not parole violations. Under these circumstances the officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of their search. [Citations.]" (*In re Martinez*, *supra*, 1 Cal.3d at pp. 646-647.)

Subsequent decisions in *Tyrell J.*, *supra*, 8 Cal.4th 68, and *People v. Reyes*, *supra*, 19 Cal.4th 743, appeared to have undermined the rationale in *Martinez*, however. (See *People v. Lewis* (1999) 74 Cal.App.4th 662, 668[stating that *Martinez* can no longer be regarded as controlling authority].As discussed above, the officer in *Tyrell J.* was unaware of the search condition at the time that he stopped the minor. This court held that the search was valid due to the minor's lack of any reasonable expectation of privacy, and that the officer's knowledge was therefore irrelevant. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 89.) *Tyrell J.* also directly addressed the *Martinez* rationale, finding that case to be distinguishable because at the time of that decision, search conditions were not automatically imposed upon parolees; thus, while the defendant in *Martinez* knew he was subject to search by his parole officer, "he could reasonably expect to be free of arbitrary searches by police officers." (*Id.*, at pp. 88-89.) When this court subsequently held in *Reyes* that "[t]he 'logic of *Tyrell J.* applies equally, if not more so, to parolees' " (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751), it appeared that Marine had been effectively overruled.

However, *Tyrell J.* and *Martinez* may be distinguishable from one another on their facts, since the former involved a juvenile probationer and the latter involved an adult parolee. Further, *Tyrell J.* involved the search of the minor's person while he was outside of his home, whereas *Martinez* involved the search of the parolee's residence. *Reyes* is likewise distinguishable, as the officer in that case knew of the search condition. In fact, the facts of both *Martinez* and the instant case

are closest to this court's more recent decision in *Robles*, in that *Martinez* involved a search of a parolee's home for reasons not related to parole and without knowledge of the parole condition. *Robles* involved the same basic factual scenario, except that the cotenant there was on probation rather than parole.

This court in *Robles* focused its attention on the special protection afforded to the home under the Fourth Amendment:

> "'[Private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.' [Citations.]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 795.)

This emphasis on the sanctity of the home is consistent with prior Fourth Amendment case law. (See, e.g., *Steagall v. United States* (1981) 451 US. 204, 211, fn. 6 [101 S.Ct. 1642, 68 L.Ed.2d 38].) *Robles* thus reasonably rejected the argument that its decision in *Woods* would permit officers to indiscriminately enter a home without a warrant and without any awareness of a resident's search condition. (*People v. Robles*, *supra*, 23 Cal.4th at pp. 796-797.)

The logic of *Robles* applies with as much force to a parolee as it does to a probationer. *Robles* found that a warrantless search undertaken without knowledge of the search condition was "wholly arbitrary" (*People v. Robles*, *supra*, 23 Cal.4th at p. 797); the focus is on the objective facts known to the officer rather than on the probationer's status, and thus the search is no less arbitrary if the defendant is on parole rather than probation.

Moreover, the policy rationales identified in this court's decision in *Robles* apply with far greater force to adult parolees than they do to juvenile probationers, and particularly to searches conducted in the home. Specifically, this court identified the special importance of the probation system in the state's penal system, quoting *Russi v. Superior Court* in noting that the optimal functioning of the probation system is of

compelling public interest: (*People v. Robles*, *supra*, 23 Cal.4th at p. 799, quoting *Russi v. Superior Court* (1973) 33 Cal.App.3d 160, 168.) The court noted that "[m]any law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the 'optimum successful functioning' of the probation system."(*People v. Robles*, *supra*, 23 Cal.4th at p. 799.) Obviously this fear is not a concern at all where a juvenile probationer is searched on the street rather than in a home he shares with others. Furthermore, the fear that adult probationers and parolees will not be able to find welcoming homes if those homes are subject to arbitrary searches has no corresponding concern in the juvenile context, as parents generally have an obligation to provide shelter for their minor children.

In sum, important distinctions may be drawn between the pat down search of a minor on a public street undertaken in *Tyrell J.* and the situation in this case, i.e, a warrantless intrusion of a private home shared by an adult parolee and his cotenant. If this court declines to overrule *Tyrell J.*, at a minimum it should extend *Robles* to bar warrantless searches of adult parolees in their homes where the police are unaware of an existing search condition, and limit *Tyrell J.* to the facts decided in that case.

III.
THIS COURT'S HOLDING IN *PEOPLE V. ROBLES* APPLIES EQUALLY TO PAROLEES OR PROBATIONERS AND TO THEIR CO-TENANTS

Although this court's holding in *Robles* on its face applies only to persons who reside with probationers, the principles enunciated in that case apply with equal force to probationers or

parolees themselves where the searching officers have no knowledge of the search condition or parole status. Thus, this court should uphold the appellate court's decision as to appellant McDaniel as well as to appellant Sanders.

Despite its discussion of the differing expectations of privacy of the person subject to the search condition and the people who simply reside in the same house, the *Robles* decision was largely based on considerations that apply equally to both McDaniels and his coappellant. *Robles* emphasized the sanctity of the home and the desirability of deterring wholly arbitrary police conduct. The court distinguished between the *Tyrell J.* situation where the search occurs on the street, and the search of a persons shome, and pointed out the different concerns in each situation.

Specifically, the court highlighted the purpose of the exclusionary rule, i.e.,"'to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures,' [Citations]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 799.) In *Tyrell J.*, the court concluded that abandoning a strict "knowledge-first"rule would not encourage law enforcement officials to engage in warrantless searches of juveniles, because officials would run the risk that any contraband found would be inadmissible in court if the juvenile turned out to not be subject to a parole condition. Thus, the court concluded, police officers have sufficient incentive to avoid an improper search of a person. (*People v. Robles*, *supra*, 23 Cal.4th at p. 799, citing *In re Tyrell J.*, supra, 8 Cal.4th at p. 89.)

The court held, however, that residential searches "present an altogether different situation." (*People v. Robles*, *supra*, 23 Cal.4th at p.800.) Because a home may be shared by multiple people, including friends, family, and guests, permitting prosecutors to validate warrantless residential searches after the fact by showing that an occupant is subject to a search clause "would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later." (*Ibid.*) This scenario, reasoned the court, would create a

significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification. (*Ibid.*)

> The potential for abuse, with its consequent impact on the citizenry, is especially heightened in high crime areas where police might suspect probationers to live. Thus, while society generally has an interest in having all probative evidence before the court, in circumstances such as these a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures. [Citation.]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 800.)

This goal would be significantly undermined if evidence seized during a search could be used against some occupants of the home but not against others. Restricting the holding in *Robles* to apply only to those who reside with probationers or parolees would largely eliminate the effect of deterring police misconduct. In fact, allowing evidence seized against a parolee during a warrantless, suspicionless search of his home with no prior knowledge of his status encourages the very sort of police conduct that this court tried to forestall in *Robles*. The court of appeal summarized the danger of this result: "The end result is that while non-parolee residents may vindicate their Fourth Amendment rights, they will still be forced to endure warrantless, suspicionless searches of their homes because the police can hope that someone in the home will be on probation or parole." (Slip op., p. 17.)

The *Robles* decision rested on sound public policy concerns and is consistent with the most basic principles of the Fourth Amendment and the exclusionary rule. This court should not undermine that holding by arbitrarily limiting its reach.

CONCLUSION

For the reasons stated above, appellant Kenton McDaniels asks this court to affirm the decision of the Court of Appeal. Specifically, McDaniels urges the court to overrule the decision in *In re Tyrell J.*, bringing California's Fourth Amendment jurisprudence back into line with federal standards and readopting the balancing test articulated in *People v. Burgener* and *United States v. Knights*. In the alternative, McDaniels urges the court to limit the reach of *Tyrell J.* to the factual scenario presented in that case, i.e., a juvenile probationer searched outside of his home. Finally, McDaniels asks the court to refuse to arbitrarily limit its holding in *People v. Robles* to people who reside with probationers and parolees, because to do so would greatly undermine the purposes articulated in that cases.

Dated: July 22, 2002

Respectfully submitted,

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APPENDIX C

Court of Appeal 2nd Crim. No. B148489

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL BARRON, Defendant and Appellant.	Court of Appeal 2d. Crim. No. B148489 (Ventura County Case No. 2000102189)

FROM THE SUPERIOR COURT OF VENTURA COUNTY
THE HONORABLE BRUCE CLARK, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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Court of Appeal 2nd Crim. No. B148489

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL BARRON, Defendant and Appellant.	Court of Appeal 2d. Crim. No. B148489 (Ventura County Case No. 2000102189)

STATEMENT OF THE CASE

A felony information filed October 17, 2000 alleged that appellant committed one count of possession of cocaine on September 15, 2000, a felony in violation of Health & Safety Code Section 11350 subdivision (a). (CT 38-39.)

Appellant filed a motion to suppress evidence on the grounds that the search leading to the discovery of the cocaine violated appellant's Fourth Amendment rights. Specifically, appellant argued that he was searched arbitrarily in violation of the rule set forth in *People v. Reyes* (1998) 19 Cal.4th 229) (CT 1-4; 24; 40-45.) The prosecution claimed appellant's motion failed to comply with the notice requirements of *People v. Williams* (1999) 20 Cal.4th 119, but declined a continuance of the suppression hearing offered by the court as a remedy. (CT 5-12; RT 9, 13.) Following a suppression hearing, appellant's motion was denied. (CT 52; RT 37.) He renewed his motion prior to trial, and the renewed motion was also denied. (CT 40-45; RT 4.)

Appellant entered a guilty plea, imposition of sentence was suspended, and he was placed on probation for three years. (CT 70-72; RT 14.)

STATEMENT OF FACTS

Motion to Suppress

On September 15, 2000, Deputy Chavez of the Moorpark Police Department made a traffic stop of a driver who failed to obey a stop sign. (RT 15.) Appellant was a passenger in the right front seat of the car. While obtaining identification from the driver, Chavez recognized appellant from prior contacts, and knew that he was on probation for narcotics and weapons violations. (RT 16-17.) Chavez obtained identification from the driver, then ordered both appellant and the driver out of the car. (RT 17.) Chavez requested dispatch to run both the driver's name and appellant's name for warrants and probation. (RT 17-18.) Dispatch confirmed that appellant was still on probation. (RT 18.)

Chavez advised appellant that he was going to conduct a search pursuant to the terms of probation. (RT 18, 21.) A pat-down search for weapons yielded nothing. Chavez then ordered appellant to removed his shoes and socks. A small quantity of cocaine fell out of appellant's left shoe. (RT 18-20.) Appellant was then arrested. (RT 20.)

ARGUMENT

THE SEARCH VIOLATED THE FOURTH AMENDMENT AS INTERPRETED BY BOTH FEDERAL AND STATE CASE LAW.

In *People v. Bravo* (1987) 43 Cal.3d 600, the California Supreme Court held that a probationer consents in advance to search of his person and property in exchange for the

opportunity to avoid prison. (*People v. Bravo, supra*, 43 Cal. 3d at 608-609.) Subsequent decisions have confirmed that a probation search violates the Fourth Amendment only if it is arbitrary, capricious or harassing. (*In re Anthony S.* (1992) 4 Cal.App.4th 1000; *People v. Reyes* (1998) 19 Cal.4th 743.) According to the California Supreme Court, the United States Supreme Court has not squarely decided the issue, and Ninth Circuit decisions requiring -- at a minimum -- reasonable suspicion, are not controlling. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 78-79.)

Under California's interpretation of federal constitutional law, then, probationers waive all protection from search and seizure except that which is arbitrary, capricious, or harassing. (*People v. Reyes, supra*, 19 Cal.4th at 753-754.) A search that is arbitrary, capricious, or harassing is one motivated by illegitimate purpose, such as personal animosity, (*In re Anthony S., supra,* 4 Cal.App.4th 1000, 1004, cited with approval in *People v. Reyes, supra,* 19 Cal.4th at 754.)

The problem with the court's application of the arbitrary, capricious or harassing rule here is twofold, First, that minimal measure of privacy does not satisfy the Fourth Amendment. Instead, as federal law requires, a probation search must be supported by reasonable suspicion that the subject of the search has resumed his course of criminal activity. Second, the search here was wholly arbitrary, and thus even under the California rule the motion to suppress should have been granted. Furthermore, the detention was unreasonable because Officer Chavez had no authority to order appellant out of the car and detain him while checking on his probation status.

A. The Fourth Amendment Requires Reasonable Suspicion That a Probationer has Violated the Terms of Probation Before a Search is Permissible

Fourth Amendment suppression issues must be reviewed under federal constitutional standards:

> Under California law, issues relating to suppression of the evidence derived from police searches and seizures must be reviewed under federal constitutional standards. [Citations.] (*People v. Robles* (2000) 23 Cal.4th 789, 794.)

The validity of a search conducted by state law enforcement officers "is ultimately a question of federal law." (*United States v. Davis* (9th Cir 1991) 932 F.2d 752, 758, citing *United States v. George* (9th Cir. 1989) 883 F.2d 1407, 1412.)

Fourth Amendment rights are triggered when there exists a reasonable expectation of privacy, As do California courts, federal courts recognize that probationers have a diminished expectation of privacy. (*See, e.g., United States v. Davis, supra*, 932 F.2d at 758.) Under federal law, a warrantless probation or parole search conducted for proper administrative purposes, to promote the goals of probation or parole, must be supported by reasonable suspicion. (*Id.* at 758; see, e.g., *Toomey v. Bunnell* (9th Cir. 1990) 898 F.2d 741, 744 [warrantless parole searches may be conducted with reasonable suspicion]; *United States v. Giannetta* (1st Cir. 1990) 909 F.2d 571, 577.)

Federal courts also impose a reasonableness requirement where a search is conducted pursuant to a signed waiver allowing search "with or without reasonable suspicion," and under similar statutory schemes. (See, e.g., *United States v. Giannetta, supra*, 909 F.2d 571, 576, relying on *Griffin v. Wisconsin* (1987) 483 U.S. 868. Reasonable suspicion is the *minimum* level of Fourth Amendment constitutional protection. (*Id.*)

"Reasonable suspicion" means "specific and articulable facts" rather than "a mere inchoate and unparticularized suspicion or hunch. " (*Maryland v. Buie* (1990) 494 U.S. 325; see *also United States v. White* (CA DC 1981) 648 F.2d 29, 35; *In re Tony C.* (1978) 21 Cal.3d 888; *People v. Glaser* (1995) 11 Cal.4th 354.)

In *People v. Souza* (1994) 9 Cal.4th 224, the California Supreme Court addressed the question of what factors may be

lawfully considered as a basis for reasonable suspicion. In that case, the Court explained that "the whole picture" must be assessed: the whole picture must yield a particularized suspicion ... that the particular individual being stopped is engaged in wrongdoing.'" (*Id.*)

It is undisputed here that Deputy Chavez was relying solely on appellant's probation terms in conducting the search. The suppression hearing yielded no facts evidencing suspicious behavior of any kind by appellant. He simply happened to be a passenger riding with a driver who failed to stop at a stop sign.

Deputy Chavez testified at the suppression hearing:

"Q: Right. And you did not suspect him [appellant] of any criminal activity when you told him you were going to invoke his probation search terms?

A: Correct.

Q: And the only reason you searched him was to invoke search terms?

A: Yes.

(RT 19.) Under these circumstances, it is clear that appellant was searched for no particular reason whatsoever, other than because the opportunity presented itself.

Even where a person has waived his Fourth Amendment rights in exchange for the privilege of probation, mere coincidental contact with a probationer -- who has in no manner acted suspiciously fails to provide the type of rational basis for a probation search that is required under Ninth Circuit case law and the United States Supreme Court's decision in Griffith, *supra* 483 U.S. at 873-880. Therefore, appellant's motion to suppress should have been granted since the search was not supported by reasonable suspicion that appellant had resumed criminal activity.

B. The Search was Arbitrary.

Although the concept of "arbitrary" is inherent to the "abuse of discretion" standard employed by the Courts of Appeal on review, the term is infrequently defined in California

case law. Ultimately there is a notable lack of case law discussing the Fourth Amendment "arbitrary, capricious or harassing" limitation on probation searches as established in *Reyes*.[1]

Arbitrary is defined according to common usage in this manner: "subject to individual will or judgement without restriction; contingent solely upon one's discretion. (Random House Webster's Collegiate Dictionary, Second Edition, 1997.) Among the few California decisions that have interpreted the concept is Division Six's opinion in *In re Anthony S.*, *supra*, 4 Cal.App.4th at 1002. In that case a minor, Anthony S., had voluntarily agreed to search of his person, residence or vehicle by a probation officer or law enforcement officer with or without a warrant or reasonable cause. The search condition listed specific categories of items that could be the subject of search. (*Id.*) Anthony S. was a member of the Ventura Avenue Gangsters, and the search term had been imposed as part of an earlier declaration of wardship. (*Id.* at 2002-2003.)

One evening in December, 1990, Ventura Police Officers decided to search the homes of several Ventura Avenue Gangsters, including the home of Anthony S. pursuant to juvenile probation agreements. The officers arrived at Anthony S.'s parents' apartment and announced their intent to search for the items listed in the search condition, including stolen property, alcohol, weapons, and gang paraphernalia." (*In re Anthony S.*, *supra*, 4 Cal.App.4th at 1003-1004.)

The minor was not at home, and his bedroom door was locked. With the assistance of the local Fire Department, the door was forced open and an assortment of weapons, drug paraphernalia, possible stolen property, and ammunition were

---

1. The concept of arbitrary has also been equated with the "rational basis" standard of review: "A plaintiff must show that [her] dismissal was 'without any discernible rational basis.'" (*Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1552; see also, *Santa Monica Beach, LTD v. Superior Court* (1999) 19th Cal.4th 952, 1020, Chin, J., dissenting.)

discovered. (*Id.*)

On appeal, Anthony S. claimed that the search was arbitrary. In addressing that argument, this Court explained that the legal meaning of the term "arbitrary" refers to the executing officer's motivation. (*Id.*, at 1004.) On the facts before it, the search was not legally "arbitrary" but rather was motivated by the officer's decision that a probation search at the minor's home was necessary to ensure compliance with the terms of his wardship. (*Id.* at 1005-1006.)

The facts here are distinguishable from those in *In re Anthony S.* In that case, the officers determined in advance that a search of several gang members' homes was appropriate. Based on that decision, the officers executed the warrantless search provisions upon which the minor's juvenile probation was dependent. Here, in contrast, Deputy Chavez made no such decision regarding appellant prior to the traffic stop. Instead, the traffic stop was executed for reasons wholly unrelated to appellant's probation. It was mere happenstance that appellant, whom Deputy Chavez recognized, was a passenger in a car driven by a person who committed a traffic violation, It was only after the traffic violation detention commenced, and for no particular reason at all, that Deputy Chavez decided to proceed with a probation search.

Moreover, the cocaine was not located even upon a "mere" patdown search for weapons. Instead, Deputy Chavez searched appellant's pockets and, finding no contraband, required appellant to remove his shoes and socks. Under these circumstances, the traffic stop offered a random and arbitrary opportunity to detain and search a probationer. Such a search exemplifies the concept of "arbitrary" explained in *People v. Reyes*.

In comparison, in *In re Bihn L.* (1992) 5 Cal.App.4th 194, an officer stopped a car in which there were several passengers who appeared to be minors. Appellant, who was one of the minors detained, was subject to probation search terms resulting from prior contact with the juvenile court. The detaining officer conducted a pat-down search for weapons of appellant, and

found a loaded pistol. In concluding that the search was not unlawful, the Sixth District found "no clear evidence that the officer did not believe the theory of potential truancy he outlined at the suppression hearing ... (*In re Bihn L.*, *supra*, 5 Cal.App.4th at 206.) The concept of arbitrary was rejected on the grounds that the officer had a reasonable basis to detain and search: the officer believed the minor violated truancy laws.

Similarly, in *People v. Jordan* (1986) 42 Cal.3d 308, the California Supreme Court addressed whether a sentencing judge had exercised its discretion in an arbitrary, capricious, or unreasonable fashion. In answering that question, the Court reviewed the objective factors considered by the trial court, including the appropriate mitigating factors. (*Jordan*, *supra*, 42 Cal.3d at 308.)

In each of these cases -- *Jordan*, *In re Bihn*, and *In re Anthony S.* -- arbitrary is defined by the presence of factors proving its opposite reasonable, considered, discriminate, non-random conduct. Here, in contrast, appellant was initially detained only because he was believed to be on probation. Appellant was then searched, once probation was *confirmed*, simply because Officer Chavez believed appellant *could* be searched. Such a search completely lacks any explanation other than as an arbitrary act. If the concept of arbitrary is to mean anything, it must be understood to prevent random searches that occur only because the opportunity to detain presents itself by mere chance alone.

C. Officer Chavez Violated the Fourth Amendment When He Ordered Appellant Out of the Car and Detained Him to Run a Warrant and Probation Check.

Even if this Court were to find that the search was not arbitrary, it should find that the detention leading to the search was unreasonable, and thus the search itself unlawful.

A passenger in a vehicle stopped for a traffic violation is deemed "detained" within the meaning of the Fourth

Amendment. (*People v. Grant* (1990) 217 Cal.App.3d 1451.) If the initial stop of a vehicle and its operator is lawful, that initial stop is also lawful as to the passenger. (*Id.* at 1460.) The seizure of the passenger is not lawful, however, if extended beyond the time necessary to cite the driver. (*In re Tony C.* (1978)) 21 Cal.3d 888; *People v. Glaser* (1995) 11 Cal.4th 354; *Florida v. Royer* (1983) 460 U.S. 491, 500.) An investigatory traffic stop may not include activities beyond the original purpose of the stop if those activities prolong the stop beyond the time it would otherwise have taken. (*People v. Bell* (1996) 43 Cal.App.4th 754, 767; *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 435-437.)

The test for determining when a detention has occurred is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole . . . . (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.) Circumstances that demonstrate a detention include display of a weapon, a physical touching, or an officer's language (or tone of voice) indicating that compliance might be compelled. (See, e.g., *In re Cristopher B.* (1990) 219 Cal.App.3d 455, 460, citing *United States v. Mendenhall* (1988) 446 U.S. at 567.)

In *People v. Verin* (1990) 220 Cal. App. 3d 551, the First District held that a police officer's command to defendant to "Hold it. Police." constituted a detention. (*Id.* at 556, citing *People v. Bower* (1979) 24 Cal.3d 638 [When a police officer commands a citizen to stop, the citizen is not longer free to leave and has been detained].)

In *People v. Wilkins* (1986) 186 Cal.App.3d 804, two occupants of a parked station wagon were "seized" when a parol officer parked his vehicle behind the station wagon in such a way as to prevent the occupants' exit. Although the officer did not use the patrol car siren or red lights, a show of authority sufficient to trigger Fourth Amendment protections was implicit in the manner in which the police car blocked the parked station wagon. (*People v. Wilkins, supra*, 186 Cal.App.3d at 809; see also *United States v. Holloway* (5th Cir.1992) 962 F.2d 451 and *United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403; see

also *United States v. PenaCantu* (5th Cir.1981) 639 F.2d 1228 [agents who pull up behind a stationary car, position themselves on either side of the car, and question the occupants, have detained those occupants] and *State v. Walp* (Ore. 1983) 672 P.2d. 781 [after suspect stops car on shoulder of road, officer causes a detention by pulling up behind suspect and turning on overhead tights].) Similarly, a verbal command to submit to authority, and submission to that command, cannot be interpreted other than as a detention. (*People v. Gonzalez* (1992) 7 Cal.App.4th 381, 383-384 and *People v. Lionberger* (1986) 185 Cal.App.3d Supp. 1.)

The Second District's analysis in *People v. Spicer* (1984) 157 Cal.App.3d 213 in also instructive on the point. In *People v. Spicer*, the Court held that when an officer approaches a passenger, demands identification, and flashes a light toward her purse as she searches for the requested document, the passenger has been detained within the meaning of the Fourth Amendment:

> In the case at bench, Ms. Spicer was contacted as she sat in the passenger seat of an automobile in a residential neighborhood at 1:30 in the morning. Her freedom of movement was practically nil. [Citation.] To say under these circumstances that Ms. Spicer '[remained] free to disregard the [officer's] questions and walk away' [citation] would be to defy what common sense tells us. (*Id.* at 218.)
>
> ... The evidence also supports the conclusion Ms. Spicer's freedom of movement was restrained by a show of authority [Citations.] She was confronted by a uniformed officer almost immediately after the car in which she was riding was stopped. Without any explanation or prefatory remarks, the officer requested her driver's license. (*Id.* at 219)
>
> The officers in that case stopped the vehicle when the

driver caused it to weave between lanes. While the driver was submitting to a field sobriety test with one officer, another officer demanded that the passenger produce her driver's license. As the passenger rummaged through her purse, the officer pointed his flashlight into the car. He observed a handgun in the purse, which he confiscated and determined was loaded. The passenger was arrested and charged with carrying a concealed weapon and carrying a loaded firearm in a public place. (*Id.* at 213-214.)

The trial court granted defendant's motion to suppress, the Superior Court appellate department reversed that ruling, and the Court of Appeal ordered the motion to suppress granted, finding the request to produce a driver's license, coupled with the coercive nature of that request. constituted an unlawful seizure.

The People in Spicer argued that even if the contact with defendant constituted a seizure, the officer's demand for a license was reasonable. The People claimed defendant might have chosen to take possession of the car once the driver was arrested pursuant to Vehicle Code § 22651 subdivision (h). The Court disagreed:

> Of course, even if the premise were established, it would not justify a detention of the passenger in order to determine whether the passenger possessed a valid driver's license. Only a reasonable suspicion of criminal misconduct justifies a detention, (*Id.* at 211, citing *Brown v. Texas* (1979) 443 U.S. 47, 51.)

Here, the case law demonstrates that appellant and the driver were detained for a traffic violation, and that appellant was further detained when Officer Chavez ordered appellant out of the car along with the driver. No reasonable person would have considered himself or herself "free to leave" under such circumstances.

Furthermore, as in *People v. Spicer*, Officer Chavez had no reason to suspect that appellant was engaged in criminal activity

when he ordered appellant out of the car and ran a warrant and probation check. The only reason Officer Chavez detained appellant was to check his probation status and search him.

The question, then, is whether *Reyes*, interpreted in a manner consistent with the Fourth Amendment, permits an officer to detain a potential probationer absent any suspicion of wrongdoing, while the officer conducts a warrant and probation check. Appellant contends that the Fourth Amendment does not authorize such a suspicionless detention solely to confirm probation for purposes of a probation search.

As Justice Kennard noted in dissent in *Reyes*, the Fourth Amendment imposes a reasonableness requirement where a search is authorized by a signed waiver allowing search "with or without reasonable suspicion. " (*Reyes, supra*, 19 Cal.4th at 759-760; *see also*, *United States v. Gianetta* (1st Cir.1990) 909 F.2d 571, 576, relying on *Griffin v. Wisconsin* (1987) 483 U.S. 868.) Moreover, most states interpret the Fourth Amendment as requiring at least *some* degree of suspicion of wrongdoing before an officer may detain a probationer for a probation search. (*See, e.g., Reyes*, 19 Cal.4th at 760-762, J. Kennard dissenting,) Other states limit abuse of probation search terms by allowing only probation officers to conduct such searches. *(Id.* at 762.)

Contrary to the approach outlined by Justice Kennard in dissent in *Reyes*, by Ninth Circuit case law, and by most other states, Deputy Chavez detained appellant without suspicion of wrongdoing solely with the aim of determining whether appellant was still on probation. The purpose of the detention, in turn, was to conduct a probation search if the search terms were still in effect.

To interpret the Fourth Amendment as allowing such a detention of passengers to check for warrants and probation exceeds the bounds of the Fourth Amendment. The detention that occurred here was not part of a "randomly" planned probation enforcement search, nor did it arise from *any* degree of suspicion that appellant might be reoffending, Instead, the detention was justified only by the prospect of discovering that

appellant was still on probation, and thus subject to a suspicionless probation search. Such detention did not meet even the most minimal level of reasonableness under the Fourth Amendment.

D. Appellant Should be Afforded an Opportunity to Withdraw His Plea.

The court's failure to suppress evidence illegally obtained substantially affects a defendant's decision to plead guilty. In *People v. Miller* (1983) 33 Cal.3d 545, the California Supreme Court explained that where a motion to suppress is improperly denied and a defendant subsequently pleads guilty, the remedy is to return to parties to the "status quo" by allowing the defendant to withdraw his plea in light of a corrected legal ruling on the suppression issue. *(Id.* at 555-556.)

This result is proper because, because the court's failure the cocaine was crucial to appellant's decision to plead guilty. A strategic decision to enter into a particular plea bargain "hinges not only on the strength of the prosecution's case, but also upon the probable effectiveness of the defenses and exculpatory evidence available to the accused." *(Id.* at 551.) Thus, on appeal it cannot be determined on a "blank" record whether the error was harmless. *(Id.* at 555-556.)

CONCLUSION.

Because the search of appellant's shoes failed to comply with federal law as interpreted by federal courts, and because even under California's arbitrary, capricious, and harassing standard the search was unreasonable, appellant respectfully requested that his motion to suppress be granted and that he be provided an opportunity to withdraw his plea.

DATED: September 17th, 2001

Respectfully submitted,

[Signature]_____
Lyn A. Woodward
Attorney for Appellant,
DANIEL BARRON

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF MONTEREY

I, Lyn A. Woodward, am employed in the County of Monterey, State of California. I am over the age 18 and not a party to the within action. My business address is 309 Prescott Lane, Pacfic Grove. California 93950.

On September 17, 2001, I served the following document, known as **APPELLANT'S OPENING BRIEF (People v. Barron)** in this action by placing a true copy thereof in a sealed envelope addressed as follows:

STATE ATTORNEY GENERAL
5th Floor--North Tower
300 S. Spring St.
Los Angeles, California 90013

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

CLERK OF THE SUPERIOR COURT
COUNTY OF VENTURA
800 South Victoria Avenue
Ventura, California 93009-0001
(for delivery to the Honorable Bruce A. Clark,
Judge Presiding)

OFFICE OF THE DISTRICT ATTORNEY
Ventura County
800 South Victoria Avenue
Ventura, California 93009

Daniel Barron
861 Walnut Canyon Rd.
Moorpark, California 93021

Said envelopes were deposited in the mail at Pacific Grove, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with the practice of collection and processing for mailing of the firm by which I am employed. It is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 17, 2001 at Pacific Grove, California.

Lyn A. Woodward [Signature]

Supreme Court, U.S.
FILED
NOV 27

(3)

No. 02-77

In The
Supreme Court of the United States

DANIEL BARRON, Petitioner

v.

STATE OF CALIFORNIA, Respondent

On Petition for Writ of Certiorari
to the California Court of Appeal,
Second Appellate District, Division Six

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. PEOPLE V. SANDERS, WHICH IS CURRENTLY PENDING BEFORE THE CALIFORNIA SUPREME COURT, ADDRESSES PAROLE AND PROBATION SEARCHES CARRIED OUT WITHOUT PRIOR KNOWLEDGE OF DEFENDANT'S PAROLE OR PROBATION STATUS.

On February 28, 2001, the California Supreme Court granted review in *People v. Sanders*, S094088 (previously published at 84 Cal.App.4th 1211). Initially the Court deferred briefing, and held the case pending resolution in *People v. Moss*, S087478. When the California Supreme Court subsequently dismissed *People v. Moss*, it ordered briefing in *People v. Sanders* as followings:

> "This court has granted review in order to resolve the question of whether an otherwise unlawful warrantless search of a private residence may later be jus-

tified by the fact that a parolee resident in that home, even if the police were unaware of the resident's parole status at the time of the search." (Respondent's Appendix B, page 1 [Appellant's Opening Brief on the Merits in *People v. Sanders*, S094088].)

The issue now pending in P*eople v. Sanders* involves the constitutionality of searches where law enforcement officers have no advance notice of a search condition, but subsequently learn of such a condition and rely upon it to justify an otherwise illegal search. That issue is different from the issues raised in Barron's Petition. Barron asks this court to consider whether some degree of individualized suspicion is required to perform a probation search of a passenger in a vehicle lawfully stopped for a traffic violation, and he specifically challenges the California Supreme Court's "arbitrary and capricious" standard

established in *People v. Reyes* (1998) 19 Cal.4th 743. The California Supreme Court has not agreed to review its arbitrary and capricious rule for parolees and probationers, and that rule remains in conflict with the manner in which the Fourth Amendment is applied by most other states as well as lower federal courts. *See Reyes*, 19 Cal.4th at 760-762, J. Kennard diseenting.

II. THE WAIVER ISSUE WAS SPECIFICALLY ADDRESSED BY THE APPELLATE COURT.

Respondent argues that the question of whether a probationer wholly waives his Fourth Amendment rights "was not presented to the lower courts." (Brief in Opposition, 8.) The issue of waiver was addressed by the Court of Appeal, and is inherent to the decision of whether some degree of individualized suspicion is required to support a parole search.

The Court of Appeal here addressed the waiver issue as follows:

> Our Supreme Court has held that searches of parolees or probations without any reasonbale suspicion are lawful. (*People v. Woods* (1999) 21 Cal.4th 668, 675; *People v. Reyes* (1998) 19 Cal.4th 743, 751; *People v. Bravo* (1987) 43 Cal.3rd 600, 607.) The court has reasoned that an adult probationer, like appellant, consents to a waiver of his Fourth Amendment rights in exchange for the opportunity to avoid serving a state prison sentence....The consent is a complete waiver of Fourth Amendment rights, with the exception of the right to object to searches conducted for harassment or in an unreasonable manner. (*Ibid.*; *see also In re Tyrell J.* (1994) 8 Cal.4th 68, 80 [juvenile probationer subject to a valid

search condition has no reasonable expectation of privacy over his person or property]; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1006 [same].)

The Court of Appeal thus concluded that no degree of individualized suspicion is required before a parole or probation search is conducted.

III. CONCLUSION.

For the reasons set forth herein, and in his Petition, Barron respectfully requests that this Court accept review of his case.

DATED: November 20th, 2002

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